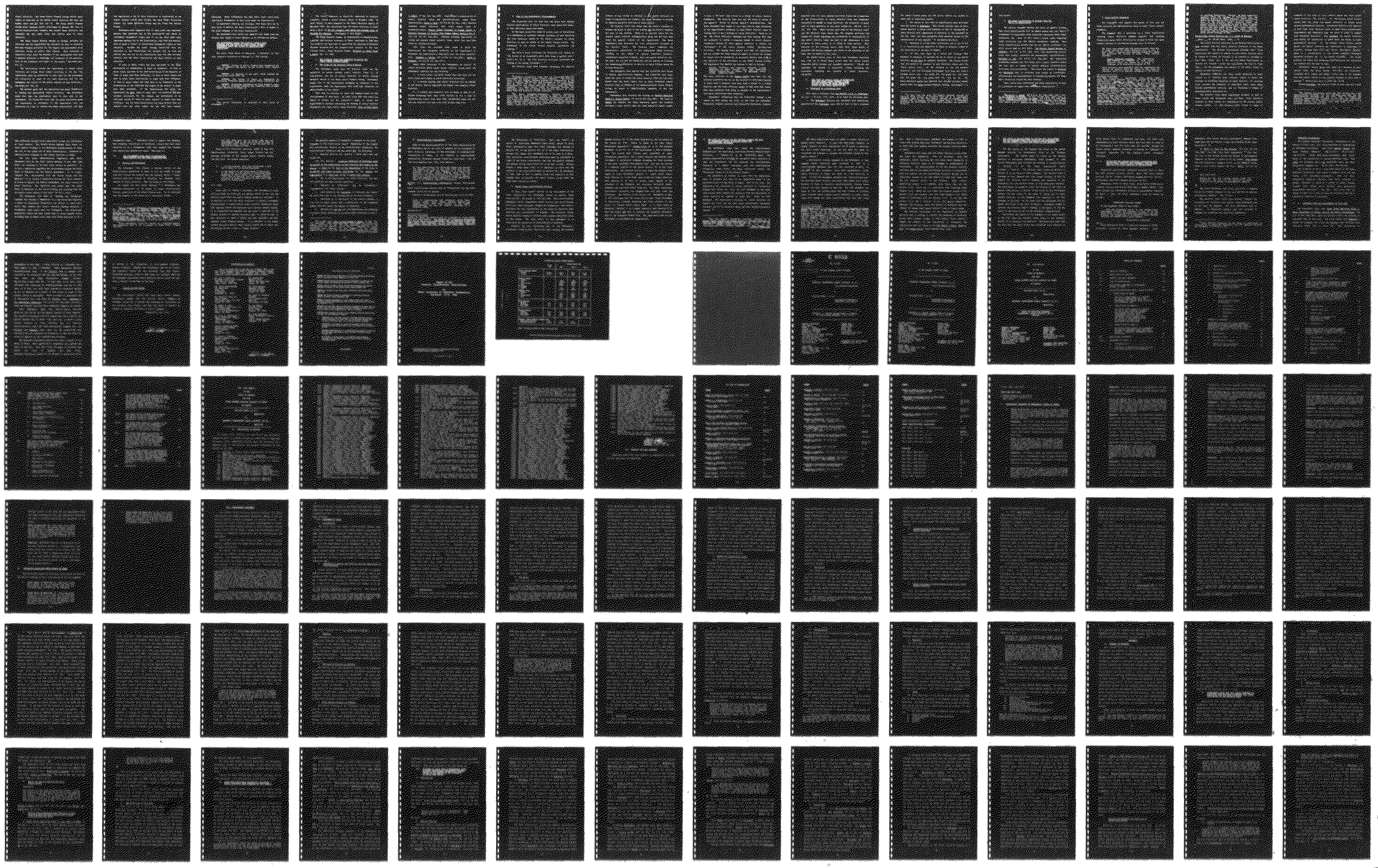
C-8353 SUPREME COURT OF TEXAS CASES 009
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL. V. KIRBY, 1988-89
WILLIAM, ET AL. (3RD DISTRICT)



school districts. The Texas School Finance System denies equal rights to taxpayers in low wealth school districts who must pay higher taxes and get less for it. The Texas School Finance System gives separate public privileges to persons who live in wealthy-districts-both students who attend those districts and taxpayers who pay lower taxes and receive more in those districts.

The Texas School Finance System is neither suitable nor efficient and the Legislature has violated its duty to establish and make suitable provision for the support and maintenance of an efficient system of public free schools. This violation is especially cruel since the drafters of our constitution knew that "a general diffusion of knowledge [is] essential to the preservation of the liberties and rights of the people," Tex.Const.art. VII, §1.

The Constitution allows the legislature to create school districts and allows those school districts to tax but "the legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public schools of such districts," Tex.Const.art. VII, §3.

The parties agree that the Legislature has great flexibility in drawing and maintaining school districts. The Defendants argue that what the Legislature does in this area is non reviewable. The Plaintiffs state that the great discretion given the Legislature is reviewable if the Legislature uses its discretion in a way to violate the Texas Constitution, and that

the Legislature's use of their discretion in structuring of the school finance system does violate the Texas Equal Protection Clause, the Texas Education Clause and the Texas Due Process Clause.

Defendants have suggested that (1) many other less important matters than education are in the Constitution and cannot be considered fundamental rights and (2) on the other hand other important matters not in the Constitution, like food and shelter, have as great a "nexus" to established fundamental rights as does education. Neither the water storage facilities that are mentioned in the Constitution nor matters such as food and shelter that are not in the Constitution have the same intimate relation with the Texas Constitution and Texas history as does education.

If food or water towers had been mentioned in the Texas Declaration of Independence it might be different. If food or water towers had been in the 1836 Constitution of the Republic of Texas it might have been different. If food or water towers had been in every Texas Constitution it might have been different. If food or water towers had been held to be "essential to the preservation of the liberties and rights of the people" it might have been different. If the Constitution had given the Legislature the duty, since at least 1845, "to establish and make suitable provisions for the support and maintenance of an efficient system of [food or water towers]" it might have been different. But the Texas Constitution and Texas history have not treated food and water towers the way they have treated

education. These differences are what makes equal educational opportunity fundamental in this state under our Constitution.

If Defendants theories are followed, this Court will not be able fully to enforce the Texas Constitution's Bill of Rights or the plain language of the Texas Constitution.

The Defendants have waived any immunity they might have had because they failed to plead immunity as an affirmative defense.

THE RESPONDENTS IGNORE THE DISTRICT COURT'S FACT FINDINGS AND THE FACTS OF TEXAS SCHOOL FINANCE; DEFENDANTS ADMIT THE SYSTEM IS INADEQUATE AND INEQUITABLE

The Texas State Board of Education, a Defendant in this case, passed a resolution on February 11, 1989 stating:

...

> WHEREAS, studies of public finance have documented the lack of adequacy and equity in the current state support system; and
>
> WHEREAS, no increase in per pupil state funding has taken place since 1985; and
>
> WHEREAS, the future of Texas is endangered by continuing financial neglect of public school education; and
>
> WHEREAS, increasing dependence on local property taxes will lead to increased inequity and financial ruin of many school districts in Texas; 1/

...

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[1]The entire resolution is attached to this brief as Attachment 1.

The Select Committee on Education, appointed by Governor Clements, issued a school finance report in November 1988. In that report, in data prepared by the Texas Education Agency in November 1988, they determined that 359 school districts in Texas with a total of 861,969 students were below the minimum level of funding for adequacy. (Attachment 2, this brief).

The Texas Research League, an organization of manufacturing, banking, and business interests in Texas, concluded in 1988 that "no progress has been made in equalizing the spending differences between property-rich and property-poor schools" in the last fifteen years. Texas Research League, Bulletin on Texas State Finance, Dec. 19, 1988.

I. THE DISTRICT COURT HAS AUTHORITY TO REVIEW THE TEXAS SCHOOL FINANCE SYSTEM.

A. The Scope of the District Court's Review

The Defendants argue that the District Court has the authority to review neither school district lines or, by implication, the use of school districts of wildly varying property wealth in the Texas school finance system. Defendants argue that if the Constitution delegates an authority to the Legislature, what the Legislature does with that authority is nonreviewable in the courts.

They seek to overturn at least one hundred years of the jurisprudence of this Court. At least since 1882 this Court has found it within its the Judiciary's power to review the Legislature's statutes concerning the drawing of school district boundaries and taxes within those districts. City of Fort Worth

v. Davis, 57 Tex. 225 (Tex.1882) (Legislature's authorization of school district taxes was unconstitutional under Texas Constitution); Parks v. West, 111 S.W.2d 726 (Tex. 1909) (Statute creating school districts that cross county lines is unconstitutional); County School Trustees of Orange County v. District Trustees of Prairie View Common School District No. 8, 153 S.W. 2d 434 (Tex.1941) (Statute allowing legislature to review and approve school district lines, after they have been voted on, unconstitutional).

This Court has reviewed other areas in which the Constitution has delegated authority to the Legislature to determine the Legislature's compliance with the State Constitution. Clements v. Valles, 620 S.W.2d 112 (Tex.1981); Smith v. Craddick, 471 S.W.2d 375 (Tex.1971).

Among other exercises of the "management of control" of school districts which would escape judicial review under the Defendants' analysis are the following:

1. A state school law which stated that only boys and not girls could participate in extra curricular activities.

2. A statute stating that school districts will be redrawn to put Blacks, Mexican Americans and Anglos into separate school districts.

3. A statute that districts will be drawn so that no oil fields producing more than 1,000 barrels of oil a year or manufacturing plants with more than $10,000,000 value are put into any district that has a tax rate of more than $.20

B. Some of the Respondents' Misstatements

The Plaintiffs have not said that the State must undergo massive consolidation of school districts, must spend more money, or that efficiency means more money.

On the equal protection cause of action, part of the problem is a difference in treatment between residents of poor districts and rich districts caused by the State's reliance on school districts to such an extent in the school finance system. The inadequacy of the school finance formulas exacerbates the problem. [2]

The State's brief criticizes the Plaintiffs for looking at "the system as an inseparable whole that forms a gordion knot," State's br. at 3. The rich districts criticize Plaintiffs for looking at the system "piecemeal." [3]

The District Court made findings concerning the negative

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[2]Defendants erroneously state that the Plaintiffs have not challenged the State's school finance formulas. The District Court, in very lengthy findings pointed out inadequacies in the state's formulas (TR.565-573) and testimony at the trial showed that at least 600 to 700 million dollars is unnecessarily distributed to rich rather than poor districts under the Texas formulas, i.e. more equity could be obtained without any additional state aid by moving $700 million dollars of state money from rich districts to poor districts.

[3]The Eanes Defendant-Intervenors (wealthy districts) criticized the Plaintiffs for looking at parts of the system rather than the whole system: "multiple classifications exist in this state with respect to the financing of education, and it is their combined effect which is at issue, rather than the isolated effect of any one classification considered piecemeal from the others," Eanes I.S.D. brief at 10-11.

effects of the system on children in low wealth districts in terms of expenditure per student, tax rates necessary to provide an adequate education and lack of local control.

The District Court also found that the State's reliance on unequal tax bases is part of the problem and the State's formulas are part of the problem. There is no rational basis for the present school district configurations which are and have been under the general control of the Legislature. The Eanes Respondents have misstated the "cost differences" statement of the District Court. The District Court commended the Legislature's sensitivity to cost differences among districts relating to the number of special education students, compensatory education students, small and sparse districts, etc. The Court did not and the Plaintiffs did not approve of allowing the tremendous differences in ability to raise revenue among the various districts.

The Defendants have implied that the Plaintiffs have failed to exhaust administrative remedies. The Plaintiffs have never asked the court to redraw the school district lines but have only stated that the State cannot rely on those irrational school district lines in defense of its unconstitutional school finance system, so resort to administrative remedies, if any, was unnecessary.

Defendants also misstate the holding in Central Education Agency v. Upshur County, 731 S.W.2d 559 (Tex.1987). The issue in Upshur was whether the Texas Education Agency had properly followed a state statute when the Texas Education Agency sought

to give a "de novo" type review to a change in school district boundaries. The issue in that case was the scope of review of one agency's review of another agency's determinations. The State Defendant have sought to cast this case as some limitation on the Legislature's authority to draw school district lines by stating that it was a warning to "state officials." State br. at 36. The "State Officials" defended the case stating that they had authority to review a proposed change in school district boundaries because of their general authority to enforce the "efficiency" of the school finance system. Tex.Educ.Code §11.52(b). The Supreme Court merely held that the Legislature had not allowed the Texas Education Agency to review the changes in school district boundaries to determine whether they were in the interests of the efficiency of the school finance system. The Legislature has amended the statute to read as follows:

> Section 19.024(f) any district affected, either remaining or newly created, must have sufficient taxable evaluations to support an <u>efficient</u> school system. (emphasis added).

The state officials in the <u>Upshur County</u> case knew that the proposed annexation was not in the interest of efficiency because it would move a property rich area from a poorer to a richer district, and the state officials sought to deal with that issue. They were prevented from doing so because of the Legislature's acts which constricted their authority.

Defendants' allegations that the Plaintiffs "sprung" a new theory on them during the trial of the case are unfounded. Plaintiffs original petition and Plaintiffs-Intervenors original

petition plus all later amended petitions listed the allegations on the irrationality of school district lines and tremendous variations in wealth in those districts, the allocation of great cost to these districts by the state system etc. (TR.144, 150 & 151, 152, 160). These matters were read to the District Court and the District Court found that the original petitions had raised all issues regarding the rationality or irrationality of the school district lines and that it was unnecessary to stop evidence on those points or to bring in other parties. This decision of the District Court, made after three months of testimony and endless argument and review of the pleadings in the case, must be upheld by this court.

Two months before trial of this case Defendants described this case as "a broad based attack upon the entire system financing public primary and secondary education," (TR.86) and described the breadth of Plaintiffs' claims including the provisions regarding the creation of school districts. (TR.86-99).

II. THE COURT OF APPEALS ERRED IN DETERMINING THAT THE TEXAS SCHOOL FINANCE SYSTEM DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE TEXAS CONSTITUTION.

A. Rodriguez Is A Different Case

This case is different than San Antonio I.S.D. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973), in at least the following ways:

1. The Rodriguez decision was concerned with federalism; specifically the Rodriguez court did not want to set a standard

for school finance plans for the entire country but wished to leave that to individual states.

2. The record in this case is significantly more developed than the record in Rodriguez. This record includes data on every school district in Texas with hundreds of bits of information on every district with comparisons of districts at the extremes, at the 5th, 10th, and 20th percentile with detailed record on the concentration of poor persons [4] in low wealth districts.

3. Education is in the Texas constitution and is not in the U. S. Constitution and education in Texas is directly linked in the Constitution to the Bill of Rights.

4. In this case there is a record and findings that hundreds of thousands of children who go to school in low wealth districts do not have an adequate education. The record proves that the majority of students in poor districts cannot pass the "basic skills test." Of the children in the 100 poorest districts, only the following percentages could pass the state's minimum skills test - 3rd grade 37%, 5th grade 41%, 7th grade 46%, 9th grade 43%, 11th grade EXIT 77%. Def. Ex. 26. The State Education Agency has admitted that 900,000 children attend schools that are below minimum adequate funding. (Attachment 2 to

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[4] In this case the poor are clearly defined; percent of families below poverty is directly from the U. S. Government standards used in the 1980 census; percent of students below poverty (85% in poorest districts) comes from U. S Government standards for entitlement to free lunch programs; see generally Pl.Ex.45.

this brief).

B. The Texas Constitution Is Broader Than The The U. S. Constitution

The parties disagree whether the Court of Appeals holding that state justifications will be upheld unless they are "wholly irrelevant" to legitimate state objectives represents Texas Equal Protection law. None of this Court's recent cases regarding equal protection uses the "wholly irrelevant" language. Many state classification systems that are not "wholly irrelevant" are still struck down by this Court. San Antonio Retail Grocers v. Lafferty, 297 S.W. 2d 813 (Tex. 1957) (law prohibiting grocery store loss leaders arbitrary and unreasonable classification); Sullivan v. UIL, 616 S.W.2d 170 (Tex.1981) (UIL regulation preventing students who have moved into a school district within the last year to engage in certain athletic interscholastic activities unconstitutional). This Court has stated in Sullivan and Whitworth that it considers such issues as overbreadth, arbitrariness and reasonableness in determining whether the Texas Equal Protection Clause has been violated.

Texas courts have interpreted the Texas Constitution as more of a protector of rights than the Federal Constitution. [5]

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[5] Whitworth v. Bynum, 699 S.W.2d 194 (Tex.1985) (Art.1,§3); In The Interest of McLean, 725 S.W. 2d 696 (Tex. 1987) (art. I, §3a) O'Quinn v. State Bar of Texas, 763 S.W.2d 397 (Tex.1988) (State Constitutional grant of free speech broader than federal free speech grant); Channel 4, KGBT v. Briggs, 759 S.W.2d 939 (Footnote Continued)

C. Local Control Arguments

The Defendants also neglect the record in this case and Texas statutory and administrative rules in their "local control" arguments.

The argument that a provision in a state constitution creating school districts somehow requires that spending disparities among school districts be allowed to exist was again soundly rebuffed by the Montana Supreme Court as follows:

> The State also argued that the Constitutional directive of local control of school districts, Art. X, Sec. 8, Mont. Const., requires that spending disparities among the districts be allowed to exist. That section provides:
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> > School district trustees. The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.
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> While Section 8 does establish that the supervision and control of schools shall be vested in the board of trustees, there is no specific reference to the concept

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(Footnote Continued)
(Tex.1988) (Gonzalez J., Concurring) (free speech rights in Texas Constitution greater than those granted by United States Constitution); Sanchez v. State, 707 S.W. 2d 575, 579-80 (Tex.Crim.App.1986) (Texas privilege against self-incrimination arises upon arrest and is broader than federal privilege); Lucas v. United States, 757 S.W. 687, 690 (Tx.1988) (open courts provision invalidates under Texas Constitution provision that is upheld under federal constitution); LeCroy v. Hanlon, 713 S.W.2d 335, 340-41 (Tex.1986) (open courts guarantee broader than due process provision); Saks v. Votteler, 648 S.W.2d 661,664 (Tex.1983) (open courts doctrine gives Texas citizens rights not given under the federal constitution); Yorko v. State, 681 S.W. 2d 633, 636 (Tex.App.-Houston) [14th District] 1984) aff'd. on other grounds, 690 S.W.2d 260 (Tex.1985) (Tex. Const. Art. I, Section 19 offers broader due process for substantive economic rights than the federal constitution.)

> of spending disparities. Further, as made especially apparent after the passage of Initiative 105, the spending disparities among Montana's school districts cannot be described as the result of local control. In fact, as the District Court correctly found, the present system of funding may be said to deny to poorer school districts a significant level of local control, because they have fewer options due to fewer resources. We conclude that Art.X, Sec.8, Mont. Const., does not allow the type of spending disparities outlined in the above quoted findings of fact.

Helena Elem. School District No. 1 v. State of Montana, ___Mont.___, No. 88-381 (Mont. 1989), p.12.

The school district provision in the Montana Constitution is much stronger than the school district provision in the Texas Constitution. The Montana Constitution provides that" [t]he supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law," Mont. Const. art. X, §8, but the Texas Constitution in Article VII, Section 3 gives the Legislature the duty to "pass laws... for the management and control of the public school or schools in such districts."

Defendants summarize the three values protected by local control as (1) insuring local citizens' rights to direct the business of providing education in their district, (2) assuring local citizens the authority to distribute their taxes among various governmental services, and (3) fostering a climate of experimentation, innovation etc.

The District Court heard significant evidence on each of these issues and determined that, in fact, local districts interest in these values are compromised by the present school finance system. (1) The District Court listed 14 pages of

examples of the lack of local control which the state allows school districts. (TR. 578-591). (2) The present school finance system does not allow low wealth districts to choose among various governmental services. Low-wealth districts are required to have high local district taxes to meet state accreditation requirements and impossibly high tax rates in order to compete with wealthier districts. This prevents low wealth districts from having the flexibility to spend their tax monies on other governmental services. (3) The present school finance system denies low wealth districts the opportunity to experiment or innovate, because they have very little "enrichment" revenue. There is a concentration of low income students, bilingual education students etc. in low wealth districts. The system prevents the state from promoting experimentation and innovation for students who are most in need.

Defendants' expert agrees that there is a decrease in local control under the Texas System, (S.F.7332) and Plaintiffs' witnesses Boyd, Sawyer and Sybert listed some of the programs that they cannot afford to even consider because on their lack of funding. [6] (Petitioners writ of error. pp. 10-18)

Unlike Rodriguez, the District Court in this case had a more

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[6]The Andrews Intervenors point out that Socorro has a new administration building, but the testimony was that the new administration building was low cost, that it allowed the previous administration building to be used for additional classroom space, and that Socorro I.S.D. still spent more than a thousand dollars per student less than most of th Defendant-Intervenors districts.

than sufficient factual record upon which to base its conclusions on local control. The United States Supreme Court based its local control findings on its Washington interpretation of Texas law, not on the actual use of Texas Constitutional, statutory or administrative standards in real school districts in Texas.

The sole state administrative regulation upon which Defendants rely for the local control defense, 19 Tex. Adm. Code §165.1 (A) relating to "as much local control as possible," is in fact a regulation regarding the relationship between the State Board of Education and the federal government. It is titled, "Chapter 165. Relationship with the United States and Its Agencies." It is clearly a regulation touting the "local control" of states as against the federal government, not local control of school districts. The regulation also states that "the State Board of Education is the policy-forming and planning body for the public school system of the state" 19 T.A.C. §165.1

The Defendants also make an "opening the floodgates" argument that because a commentator in a law review has supported a theory of educational malpractice for failure to teach basic skills that somehow this court's decision finding education a fundamental right would open the floodgates. The educational malpractice theory has been turned down by state supreme courts including some of those states that have found education to be a

fundamental right. [7] Defendants offer no support that Wyoming, West Virginia, Connecticut or California, states that have found education to be a fundamental right have somehow been flooded with educational malpractice cases. They have not.

III. THE RESPONDENTS HAVE AGAIN MISINTERPRETED TEXAS HISTORY AND THE TEXAS CONSTITUTIONAL

A. History and Efficiency

The Defendants have offered a lengthy history of the Constitutional Convention in Texas in 1875 and sought to glean from this history the notions that the founders wanted a "cheap" district-controlled system of education and demanded local control of school districts. They are wrong on both counts.

Dr. Walker has been warmly embraced [8] by Defendants and Defendant-Intervenors as an expert on Texas Constitutional history, especially in the school finance area. Yet he concluded that the framers in 1875 meant by an "efficient" system:

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[7] Doe v. Board of Education of Montgomery County, 453 A.2d 814 (Md.982); Smith v. Alameda Social Service Agency, 90 Cal.App.3d 929, 153 Cal.Rptr.712 (1979); Peter W. v. San Francisco Unified School District, 60 Cal.App.3d 814, 131 Cal.Rptr.854 (1976); D.S.W. v. Fairbanks North Star Borough School District, 628 P.2d 554 (Alaska 1981); Myers v. Medford Lakes Board of Education, 489 A.2d 1240 (N.J.1985); Torres v. Little Flower Children Services, 474 N.E.2d 226 (N.Y.1984).

[8] State Defendants listed Dr. Walker as a proposed expert, and stipulated that he was an expert on Texas school finance (TR.1991).

> one that made good use of money, that was not extravagant, that it was one as we would think of efficiency today, which is to get the most out of the dollars being utilized.

Based on his historical analysis, study of the 1875 Constitutional convention, Texas school history and his thorough knowledge of the present school finance system (TR.1990-1991), Dr. Walker testified:

> Q. ...in your opinion, does this system make a good use of money or are we wasting money?
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> A. In the opinion of the State Board of Education, in the 1930s, in the opinion of the Gilmer-Aiken Committee in their report, and on their opinion I will base my opinion, that the administrative structure of school districts in this state lend itself to inefficiency.

(S.F. 1986)

Based upon Dr. Walker's testimony, the testimony of state officials Moak and Kirby and the massive record in the case the District Court found the school finance system not efficient. It is wasteful to allow tax haven districts to protect incredible concentrations of wealth behind school district boundaries whose only apparent reason for existence is to protect taxable wealth. It is inefficient and wasteful for the state to send 600 to 700 million dollars to wealthy districts when it could be sent to poor districts to reach a fairer and more equitable and more adequate school finance system. It is wasteful to let budget balance districts protect their taxable wealth and to waste over 200 million dollars a year to "budget balance."

The greatest weakness of Defendant's argument is the plain language of the Constitution itself. Regardless of the lengthy and contradictory debates in the Constitutional convention, the Constitutional convention and the people did the following:

1. Approved Article VII, Section 1 which read then and reads now:

Art. VII, Section 1: A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature of the state to establish and make suitable provisions for the support and maintenance of an efficient system of public free schools.

2. Put on the Legislature, not school districts, the duty "to establish and make suitable provision."

3. Required an "efficient," not an "economical," "inexpensive," or "cheap" system.

4. Said education was essential to liberties and rights, the word they used in the introduction to the Bill of Rights.

5. Dedicated up to one-fourth of the state's revenue, a poll tax on every person and a continuation of the permanent school fund-all toward the support of education.

6. Specifically did not give the Legislature the authority to create school districts or to allow school districts to tax.[9]

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[9]In a 1882 case, City of Fort Worth v. Davis, 57 Tex. 225, 237 (Tex.1882), this Court held that "that power [to allow local school districts to tax] had been expressly granted in the constitution of 1869-70, art.9, sec.7. Taxation by school districts was familiar to the framers of the present constitution. It was the system generally prevailing in other (Footnote Continued)

B. Constitutional Construction

Some of the misinterpretation of the Texas Constitution by the Defendants and by the Court of Appeals can be attributed to their selective quotations of the principles of constitutional construction in Texas. In his treatise on constitutional construction, Professor Antieau stated his first Rule, 1.00, as "the plain meaning rule." This rule requires:

> at least some respect for those who framed and adopted the organic law, and it has often been said by the judiciary that when the language of a constitution provides a clear, plain, meaning which does not contradict any other provision of the organic law, or result in a ruling that is manifestly unjust or absurd, the plain meaning of the language is to be applied and there is no room for judicial construction.

Antieau, C.J. Constitutional Construction (Oceana Publications 1982)

Broad constitutional phrases must be "interpreted" but the plain language should not be ignored.

Antieau's second major rule of construction, §2.01 is that:

> words in constitutions are ordinarily given their natural, normal, usual, common, popular, general and ordinary sense, that most obvious to the common understanding, and are not usually construed in a technical sense.

Antieau at 11.

(Footnote Continued)
states, by which the deficiencies of a general or state school fund were supplemented. The omission of a provision authorizing that system was plainly intentional, for, in addition to what has been said, the journals of the Convention show that all propositions embracing that system were voted down. (emphasis added)

The definitions of "efficiency", "may", and "shall", as quoted in petitioner Edgewood's main brief, should be given first consideration when this Court considers the meaning of Article VII, §1 and Article VII, §3 of the Texas Constitution. Antieau also argues that amendments are to be read as a whole, that particular constitutional provisions must be considered in light of the entire constitution, and that the general purposes and objects of the constitution are to be kept in mind. Antieau Chapter 2 Under these rules, it is impossible to think that the drafters of the constitution meant by Article VII, §3 amendments in 1883, 1909 or 1927 to somehow revoke the authority of this Supreme Court to consider the school finance system under the Texas Equal Protection Clause.

C. Recent Texas Constitutional History

In their "more recent" history of the development of the Texas Constitution the Defendants failed to mention Texas Const.art.VII, §3b passed in 1962 and 1966. This constitutional amendment, titled "Independent School District and Junior College Districts; taxes and bonds; changes and boundaries;" sets forth a procedure for the continuation of tax rates in districts when districts are consolidated or annexed. The provision allows school district boards to continue taxes without additional votes of the people. The clear thrust of this amendment is to facilitate the annexation or consolidation of districts.

Possibly the most misleading part of the Defendants' historical review is their implication that, because the proposed

amended Article VII of the Texas Constitution was not passed by the voters in 1976, voters in Texas do not want "equal educational opportunity." Irving I.S.D. br. at 34. The proposed amendment to Art. VII, §1 of the Constitution to add a statement that "the system must furnish each individual an equal educational opportunity, but a school district may provide local enrichment of educational programs exceeding the level provided by the state consistent with general law," was only one section of a complete rewrite of the entire Article VII of the Texas Constitution. The proposed Article also added new concepts with regard to local enrichment (Section 1), county public school funds (Section 3), a new Texas fund called the Higher Education Fund (Section 9) as well as several other changes in the structure of the Permanent and Available University Funds, Permanent and Available School Funds etc. The "equal educational opportunity" provision, was weighed down with many other new provisions. The failure of the Article VII. amendments to pass in 1976 could mean that the voters did not want "local enrichment of educational programs exceeding the level provided by the state," or "County Public School Fund" or "a state board of education" (Section 4) or a Higher Education Fund (Section 9) or that the people did want to continue the Permanent University Fund or the Permanent School Fund. The implication made by the Defendants is misleading and inappropriate.

IV. THE COURT OF APPEALS DID NOT PROPERLY ASSESS THE ROLE OF INDEPENDENT SCHOOL DISTRICTS WITHIN THE CONSTITUTIONAL FRAMEWORK

The Defendants argue that "under the constitutional authorization, the legislature could have directly created school districts; ..." Andrews br. at 38. Plaintiffs agree. The problem confronted by residents of low wealth school districts is that the Legislature did not exercise its constitutional authority in a manner consistent with its constitutional obligations under either the Equal Protection Clause, the Educational Clause or the Due Process Clause.

The Defendants go further to state that the Legislature chose to delegate this part of its legislative power to the qualified voters of the State of Texas. This is not true. The Legislature has continued to create districts by legislative statute both before and after the 1927 amendment to the state constitution which removed the authority from the Legislature to create districts by "special or local law." After the 1927 amendment, the Legislature continued to create districts by special and local law and then would periodically "generally validate" all of the districts which had been unconstitutionally created. [10]

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[10] See the "general validation statutes' referred to in County School Trustees of Orange County v. District Trustees of Prairie View Common School District No. 8, 153 S.W. 2d 434 (Tex.1941); Marfa I.S.D. v. Wood, 141 S.W. 2d 590 (Tex.Common.App.1940) opinion adopted); and West Orange Cove (Footnote Continued)

The Texas Legislature knows its power to create, destroy or modify school districts. It only uses that power, however, to create "special or local legislation" or to create a structure for local power brokering. It has not used its power to "establish and maintain a suitable and efficient system of free public schools."

A particularly curious argument by the Defendants is that somehow school districts were validated in 1909 by a constitutional amendment (Art. VII, §3a, rescinded in 1969). At the time of that amendment, there were approximately 10,000 school districts in Texas; now there are 1,060 districts in Texas. If the 1909 amendment validated and "constitutionalized" the existing school district structure, then almost every school district in Texas is presently unconstitutional, because every district has been changed in some way. The 1909 amendment was meant to cure the problem which had been created by previous state statutes which allowed school districts to cross county lines even though the state constitution said that they could

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(Footnote Continued)
Consolidated I.S.D. v. County Board of School Trustees of Orange County, 430 S.W. 2d 55 (Tex.Civ.App.Beaumont-1968 writ ref.d, n.r.e.) Vernons and the Texas Session Laws are replete with examples of "special and local legislation" in the area of the creation and management of school districts by the legislature. See for example, Vernon's §§ 2740A (1939), 2740B (1929), 2740D (1931), 2740f-2 (1937) 2470f-3 (1941); and H.B. 723, 47th Leg. (1941); H.B. 732, 47th Leg. (1941); H.B. 1023, 47th Leg. (1941); H.B. 948, 47th Leg.. (1941); S.B. 61, 53rd Leg. (1953); S.B. 100, 59th (1965); Leg. (1965), S.B. 401, 59th Leg. (1965); H.B. 493, 62nd Leg. (1971). Statutes described in Plaintiffs Post Hearing Brief in Court of Appeals, see Appendix II.

not. When a constitutional amendment was passed in 1909 to "cure" this problem they also "validated" the existing districts; to infer that this somehow validates the present structure makes no sense.

Defendants also argue that any school district in the state may alter its boundaries. This is incorrect. With few exceptions, school districts may only alter their boundaries if adjoining districts agree to an exchange or consolidation of territories. The superintendent of the San Elizario district testified that he had asked surrounding districts to consolidate with his district and the surrounding districts decided not to consolidate because of the high number of "high cost" kids, and the low property wealth in San Elizario. Under today's districting scheme it is somewhat more likely that the San Antonio I.S.D. would want to consolidate with bordering Alamo Heights I.S.D. (which has four times the property wealth of San Antonio I.S.D. per student) than that Alamo Heights I.S.D. would choose to consolidate with San Antonio I.S.D. To say that San Antonio I.S.D. has a "choice", or for that matter Kingsville, Edgewood, San Elizario, South San Antonio or Southside have the "choice" to change their school district lines is simply wrong.

The constant involvement of the Legislature in drawing districts and in seeking to control the structure of districts belies their present attempt to hide behind "local control." Indeed the efforts of the Legislature to circumvent the constitution were the issues in the Fort Worth v. Davis, Parks v. West, and Orange County, Texas Supreme Court cases.

V. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS HAD NOT RESERVED THEIR DUE COURSE OF LAW ARGUMENTS AND DID NOT PREVAIL ON THEIR DUE COURSE OF LAW ARGUMENT

The due course of law argument was plead in the second amended petition in intervention filed by the Alvarado Intervenors. The fourth cause of action of the amended petition of petitioner intervenors, filed November 13, 1986 stated "Defendants have violated and continue to violate Article I, Section 19 of the Texas Constitution which provides:..."(¶26,27) The District Court relied on Article I, Section 19 in its District Court Judgment. The District Court's findings of fact offered more than enough findings of fact to support the District Court's Judgment and therefore it was unnecessary for the District Court to file additional findings. The petitioners do assign as error the holding of the Court of Appeals that Article I, Section 19 was waived by the Petitioners because the due course of law cause of action was in their amended petition, in the judgment, and supported by the fact findings in the case. On the other hand the Defendants did not appeal this issue to the Court of Appeals. Defendants sought to overturn the District Court's finding on the merits of the due course of law issue but not on any procedural irregularities.

Petitioners due course of law argument is not based solely on the fact that one district cannot share in the "property wealth" of an adjoining rich district. The difficulty comes from the fact that the state forces the low-wealth local district to

raise monies from its inadequate tax base, the State puts requirements on local districts which they must meet in order to be "accredited," and the state does not provide, through its entire system, adequate resources to provide an "adequate" or "suitable" education for the students within low-wealth districts.

VI. A. DEFENDANTS AND ANDREWS DEFENDANT-INTERVENORS HAVE WAIVED THEIR IMMUNITY FROM ATTORNEYS FEES BECAUSE THEY DID NOT CLAIM IMMUNITY IN THEIR ANSWERS

Plaintiffs specifically requested attorneys fees in their May 1984 original petition (TR.28), March 1985 First Amended petition (TR.69), October 1986 Second Amended Petition (TR.163), and November 1986 Third Amended Petition (TR.279).

Defendants' State of Texas, Kirby, State Board of Education, Clements, Bullock and Mattox FILED ONLY A GENERAL DENIAL. They never pleaded the affirmative defense of governmental immunity. On April 1, 1985, the State Defendants filed an Answer as follows:

DEFENDANTS' ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

> COME NOW Defendants herein by and through their undersigned counsel and pursuant to Rule 92 of the Texas Rules of Civil Procedure deny generally, all and singular the allegations in Plaintiff's First Amended Petition and demand strict proof thereof.
>
> Respectfully submitted,

(TR.72)

State Defendants filed no responsive pleading to either Plaintiffs' Second or Third Amended Petition. State

Defendants have waived whatever governmental immunity they might have had for failure to meet the pleading burden under Tex.R.Civ.P. 94.

In Davis v. City of San Antonio, 752 S.W. 2d 518 (Tex.1988) (Tex.1988) this Court unanimously [11] held that the City of San Antonio waived its defense of governmental immunity by failure to plead it in its answer, even though the City requested a judgment N.O.V. on the immunity claim, after a jury verdict against the City. Davis, 752 S.W. at 519.

This Court held:

> Having not met its pleading burden under Tex. R.Civ.P.94, the City is not entitled to avoid liability on the ground of governmental immunity.

Id.

The State Defendants even filed, pre-trial, a lengthy motion for summary judgment in the case and did not mention governmental immunity. (TR. 77-116).

The District Court would have granted judgment for Plaintiffs for attorneys fees against State Defendants had it not been for immunity. The State Defendants have no immunity. If Plaintiffs prevail they are entitled to Judgment for attorneys fees from State Defendants.

---

[11] Four Justices dissented on the issue of sufficiency of cross-points in appellate procedure, but the immunity decision was unanimous 752 S.W.2d at 523.

Defendant-Intervenors

The Andrews Defendant-Intervenors, represented by Law Offices of Earl Luna, also filed Petitions in Intervention as Defendant-Intervenors. They filed general denials and never claimed immunity. (TR.214-217); (TR.317-320); (TR.330-333). These Defendants-Intervenors were surely aware of the possibility of paying attorneys fees. They asked for attorneys fees from Plaintiffs under the Texas Declaratory Judgment Act. (TR.317-320); (TR.330-333).

The situation is not as clear with regard to the Eanes Defendant-Intervenors, represented by Hughes & Luce, and the Irving I.S.D Defendant-Intervenors. Each of these intervenors requested immunity from being required to design, implement or maintain a system of school finance because "such relief would infringe upon necessarily governmental functions." (TR. 338). This claim does not appear to apply to a claim for monetary attorneys fees but a question of immunity is presented.

VI. B. ATTORNEYS FEES ARE RECOVERABLE IN THIS CASE

The Defendants argue that Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation, 746 S.W. 2d 203 (Tex.1987), does not provide a basis the granting of attorneys fees in this case. The state argues that Edgewood is unlike the T.S.E.U. case since the T.S.E.U. case involved state officials rather than a state law. That distinction is

meaningless in this case. A state official is a Defendant and a State Agency is also a Defendant. These Defendants enforced unconstitutional laws. In the T.S.E.U. case no damages were received by the plaintiffs and the case was brought, as was this case, under the Texas Declaratory Judgment statute, Tex.Civ.Prac.& Rem. Code §37. In that case, as in this, state officials were enforcing an unconstitutional law and in that case, as in this, the trial court granted an injunction against an act or omission by a person in the course or scope of the persons office or employment. There is simply no meaningful way to distinguish this case from the T.S.E.U. case. Camarena v. Tex. Employment Commission, 754 S.W.2d 149 (Tex.1988) involved a state law directly and this Court determined immunity was waived.

Other Defendants argue that Tex.Civ.Prac.& Rem.Code §§104.001 and 106.002 are not general waivers of state immunity. The Plaintiff-Intervenors have not argued that these statutes are general waivers but in cases, like this one, in which a state statute enforced by state officials has been declared unconstitutional under the State Declaratory Judgment Act, the T.S.E.U. and Camarena cases stand for the proposition that attorneys fees are available for Plaintiffs in that the state has waived it immunity in this limited class of cases.

The Defendant-Intervenors entered this case on behalf of the State of Texas. They significantly lengthened and confused the trial of the case. They have filed 150 pages of briefing both before the Court of Appeals and this Court. Defendant-Intervenors should not be allowed to participate fully

as parties in this litigation, to cross-examine witnesses, present witnesses, lengthen the proceedings, and not be jointly and severally liable for the attorneys fees that result. Plaintiffs petition, filed in 1984 asked for attorneys fees and the Defendant Intervenors school districts did not enter the case with a "waiver" of any fees in the case.

VII. CONCLUSION AND PRAYER

The Petitioners' briefs and these Reply Briefs support Petitioners' prayer that the District Court's Judgment be affirmed, except for a reversal and rendering for Petitioners on the attorneys fees issues, and that the Court of Appeals be ordered to reinstate the District Court's Judgment.

Respectfully submitted,

Albert H. Kauffman

ALBERT H. KAUFFMAN

CERTIFICATE OF SERVICE

This is to certify that on this 20th day of March, 1989, a true copy of the foregoing Reply Brief of Petitioners Edgewood Independent School District mailed by certified mail, return receipt requested, postage prepaid to the following counsel of record:

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ALBERT H. KAUFFMAN

2/11/89

State Board of Education Resolution

WHEREAS the State Board of Education is the policy-forming and planning body for the public school system of the state; and

WHEREAS statutes direct the State Board of Education to formulate and present budgets for operating the Foundation School Program; and

WHEREAS studies of public school finance have documented the lack of adequacy and equity in the current state support system; and

WHEREAS no increase in per pupil state funding has taken place since 1985; and

WHEREAS the future of Texas is endangered by continuing financial neglect of public school education; and

WHEREAS increasing dependence on local property taxes will lead to increased inequity and financial ruin of many school districts in Texas; now therefore, be it

RESOLVED that the State Board of Education recommends and urges that the Governor and 71st Texas Legislature declare enactment of public school finance reform to be a high priority; and be it further

RESOLVED that a program of public school finance reform be enacted that includes the following basic elements:

1. Commitment to a six-year program to increase funding of public school education to a level equal to the national average and to provide a financial basis for a quality education program;

2. Commitment to increase the equity of the public school finance program from the current equity level of 70 percent to 95 percent by 1995;

3. Immediate implementation of a guaranteed yield system of financing for enrichment equalization above the basic Foundation School Program; and,

4. An increase in state support for elementary and secondary education for the 1990-91 biennium of $1.2 billion including enrollment growth.

ATTACHMENT 1

Report of the
Financial Considerations Subcommittee

for
Select Committee on Education Deliberations
November 14-15, 1988

Materials prepared by the Department of Research and Information,
Texas Education Agency, November 8, 1988

ALTERNATIVE SCHOOL FINANCE MODELS

	Current Law	Progress Option One Year 1	Year 2	Year 6
TOTAL REVENUE IMPACT				
In millions	$9,303.5	$303.5	$618.7	$1,473.7
Per pupil	$3,135	$102	$208	$496
Revenue Gainers				
# Districts		633	700	895
ADA		1,869,332	1,992,693	2,745,687
Amount per pupil		$163	$316	$537
Base		$3,038	$3,042	$3,041
No Change				
# Districts		369	303	143
ADA		972,532	788,201	185,907
Revenue Losers				
# Districts		55	54	19
ADA		125,747	186,717	36,017
Amount per pupil		($7)	($58)	($25)
Base		$3,427	$3,557	$3,769
Fiscal Neutrality				
All districts	75.9	91.7	94.6	95.4
98% of pupils	77.0	93.1	95.9	96.2
95% of pupils	77.8	94.0	96.6	96.6
Revenue Disparity				
All districts	0.081	0.072	0.070	0.044
98% of pupils	0.071	0.064	0.063	0.038
95% of pupils	0.066	0.059	0.059	0.035
Adequacy - below $1,900 per weighted pupil				
Districts below minimum level	359	149	114	0
Pupils below minimum level	861,969	410,180	355,026	

NOTE: All models are based on 1986-87 school year data.

Prepared by the Department of Research and Information, Texas Education Agency, 11/8/88

C 8353

NO. C-8353

IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners/Plaintiffs,

V.

WILLIAM KIRBY, et al.,

Respondents/Defendants,
Defendant-Intervenors.

APPENDIX II (BRIEFS BEFORE COURT OF APPEALS) OF PETITIONERS EDGEWOOD I.S.D. ET AL.

ANTONIA HERNANDEZ
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EDGEWOOD ISD, ET AL.

NO. C-8353

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ATTORNEYS FOR PETITIONERS
EDGEWOOD ISD, ET AL.

NO. 3-87-190-CV

IN THE

COURT OF APPEALS

FOR THE

THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

AT AUSTIN

WILLIAM KIRBY, et al.,

Appellants,

v.

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Appellees.

BRIEF OF APPELLEES EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL. (EDITED)

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EDGEWOOD ISD, ET AL.

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IN THE

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FOR THE

THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

AT AUSTIN

WILLIAM KIRBY, et al.,

Appellants

vs.

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees

II. CERTIFICATE OF PARTIES

In order that members of the Court may determine disqualification or recusal pursuant to Texas Rule of Appellete Procedure 74(a), Appellees certify that the following is a complete list of the parties and persons interested in the outcome of the case:

(1) William N. Kirby, State Commissioner of Education, Appellant
(2) Texas State Board of Education, Appellant
(3) Bill Clements, Governor and Chief Executive Officer of the State of Texas, Appellant
(4) Robert Bullock, State Comptroller of Public Accountants, Appellant
(5) State of Texas, Appellant
(6) Jim Mattox, Attorney General of Texas, Appellant
(7) Andrews Independent School District, Appellant
(8) Arlington Independent School District, Appellant
(9) Austwell Tivoli Independent School District, Appellant
(10) Beckville Independent School District, Appellant
(11) Carrollton-Farmers Branch Independent School District, Appellant
(12) Carthage Independent School District, Appellant
(13) Cleburne Independent School District, Appellant

(14) Coppell Independent School District, Appellant
(15) Crowley Independent School District, Appellant
(16) DeSoto Independent School District, Appellant
(17) Duncanville Independent School District, Appellant
(18) Eagel Mountain-Saginaw Independent School District, Appellant
(19) Earnes Independent School District, Appellant
(20) Eustace Independent School District, Appellant
(21) Glasscock County Independent School District, Appellant
(22) Grady Independent School District, Appellant
(23) Grand Prairie Independent School District, Appellant
(24) Grapevine-Colleyville Independent School District, Appellant
(25) Hardin Jefferson Independent School District, Appellant
(26) Hawkins Independent School District, Appellant
(27) Highland Park Independent School District, Appellant
(28) Hurst Euless Bedford Independent School District, Appellant
(29) Iraan-Sheffield Independent School District, Appellant
(30) Irvin Independent School District, Appellant
(31) Klondike Independent School District, Appellant
(32) Lago Vista Independent School District, Appellant
(33) Lake Travis Independent School District, Appellant
(34) Lancaster Independent School District, Appellant
(35) Longview Independent School District, Appellant
(36) Mansfield Independent School District, Appellant
(37) McMullen Independent School District, Appellant
(38) Miami Independent School District, Appellant
(39) Midway Independent School District, Appellant
(40) Mirando City Independent School District, Appellant
(41) Northwest Independent School District, Appellant
(42) Pinetree Independent School District, Appellant
(43) Plano Independent School District, Appellant
(44) Prosper Independent School District, Appellant
(45) Quitman Independent School District, Appellant
(46) Rains Independent School District, Appellant
(47) Rankin Independent School District, Appellant
(48) Richardson Independent School District, Appellant
(49) Riviera Independent School District, Appellant
(50) Rockdale Independent School District, Appellant
(51) Sheldon Independent School District, Appellant
(52) Stanton Independent School District, Appellant
(53) Sunnyvale Independent School District, Appellant
(54) Willis Independent School District, Appellant
(55) Wink-Loving Independent School District, Appellant
(56) Edgewood Independent School District, Appellee
(57) Socorro Independent School District, Appellee
(58) Eagle Pass Independent School District, Appellee
(59) Brownsville Independent School District, Appellee
(60) San Elizario Independent School District, Appellee
(61) South San Antonio Independent School District, Appellee
(62) Pharr-San-Juan-Alamo Independent School District, Appellee
(63) Kenedy Independent School District, Appellee

(64) La Vega Independent School District, Appellee
(65) Milano Independent School District, Appellee
(66) Harlandale Independent School District, Appellee
(67) North Forest Independent School District, Appellee
(68) Aniceto Alonzo, on his own behalf and as next friend of his children Santos Alonzo, Hermelinda Alonzo and Jesus Alonzo, Appellee
(69) Shirley Anderson, on her own behalf and as next friend of her child Derrick Price, Appellee
(70) Juanita Arredondo, on her own behalf and as next friend of her children Agustin Arredondo, Jr., Nora Arredondo and Sylvia Arredondo, Appellee
(71) Mary Cantu, on her own behalf and as next friend of her childredn Jose Cantu, Jesus Cantu and Tonitius Cantu, Appellee
(72) Josefina Castillo, on her own behalf and as next friend of her child Maria Coreno, Appellee
(73) Eva W. Delgado, on her own behalf and as next friend of her child Omar Delgado, Appellee
(74) Ramona Diaz, on her own behalf and as next friend of her children Manuel Diaz and Norma Diaz, Appellee
(75) Anita Gandara and Jose Gandara, Jr., on their own behalf and as next friends of their children Lorraine Gandara and Jose Gandara, III, Appellees
(76) Nicolcas Garcia, on his own behalf and as next friend of his children Nicolas Garcia, Jr., Rodolfo Garcia and Rolando Garica, Graciela Garcia, Criselda Garcia and Rigoberto Garcia, Appellee
(77) Raquel Garcia, on her own behalf and as next friend of her children Frank Garica, Jr., Roberto Garcia, Roxanne Garcia and Rene Garcia, Appellee
(78) Hermelinda C. Gonzalez, on her own behalf and as next friend of her child Angelica Maria Gonzalez, Appellee
(79) Ricardo Molinda, on his own behalf and as next friedn of his child Job Fernando Molina, Appellee
(80) Opal Mayo, on her own behalf and as next friend of her chldren John Mayo, Scott Mayo and Rebecca Mayo, Appellee
(81) Hilda Ortiz, on her own behalf and as next friend of her child Juan Gabriel Ortiz, Appellee
(82) Rudy C. Ortiz, on her own behalf and as next friend of his children Michelle Ortiz, Eric Ortiz and Elizabeth Ortiz, Appellee
(83) Estela Padilla and Carlos Padilla, on their own behalf and as next friends of their child Gabriel Padilla, Appellees
(84) Adolfo Patino, on his own behalf and as next friend of his child Adolfo Patino, Jr., Appellee
(85) Antonio Y. Pina, on his own behalf and as next friend of his children Antonio Pina, Jr., Alma Pina and Anna Pina, Appellee
(86) Reymundo Perez, on his own behalf and as next friend of his children Ruben Perez, Reymundo Perez, Jr., Monica Perez, Rauel Perez, Rogelio Perez and Ricardo Perez,

Appellee
(87) Patricia A. Priest, on her own behalf and as next friend of her children Alvin Priest, Stanley Priest, Carolyn Priest and Marsha Priest, Appellee
(88) Demetrio Rodriguez, on his own behalf and as next friend of his children Patricia Rodriguez and James Rodriguez, Appellee
(89) Lorenzo G. Solis, on his own behalf and as next friend of his children Javier Solis and Cynthia Solis, Appellee
(90) Jose A. Villalon, on his own behalf and as next friend of his children Ruben Villalon, Rene Villalon, Maria Christina Villalon and Jaime Villalon, Appellee
(91) Alvarado Independent School District, Appellee
(92) Blanket Independent School District, Appellee
(93) Burleson Independent School District, Appellee
(94) Canutillo Independent School District, Appellee
(95) Chilton Independent School District, Appellee
(96) Copperas Cove Independent School District, Appellee
(97) Covington Independent School District, Appellee
(98) Crawford Independent School District, Appellee
(99) Crystal City Independent School District, Appellee
(100) Early Independent School District, Appellee
(101) Edcouch-Esla Independent School District, Appellee
(102) Evant Independent School District, Appellee
(103) Fabens Independent School District, Appellee
(104) Farwell Independent School District, Appellee
(105) Godley Independent School District, Appellee
(106) Goldthwaite Independent School District, Appellee
(107) Grandview Independent School District, Appellee
(108) Hico Independent School District, Appellee
(109) Jim Hogg County Independent School District, Appellee
(110) Hutto Independent School District, Appellee
(111) Jarrell Independent School District, Appellee
(112) Jonesboro Independent School District, Appellee
(113) Karnes City Independent School District, Appellee
(114) La Feria Independent School District, Appellee
(115) La Joya Independent School District, Appellee
(116) Lampasas Independent School District, Appellee
(117) Lasara Independent School District, Appellee
(118) Lockhart Independent School District, Appellee
(119) Los Fresnos Independent School District, Appellee
(120) Lyford Independent School District, Appellee
(121) Lytle Independent School District, Appellee
(122) Mart Independent School District, Appellee
(123) Mercedes Independent School District, Appellee
(124) Meridian Independent School District, Appellee
(125) Mission Independent School District, Appellee
(126) Navasota Independent School District, Appellee
(127) Odem-Edroy Independent School District, Appellee
(128) Palmer Independent School District, Appellee
(129) Princeton Independent School District, Appellee
(130) Progresso Independent School District, Appellee
(131) Rio Grande City Independent School District, Appellee

(131) Rio Grande City Independent School District, Appellee
(132) Roma Independent School District, Appellee
(133) Rosebud-Lott Independent School District, Appellee
(134) San Antonio Independent School District, Appellee
(135) San Saba Independent School District, Appellee
(136) Santa Maria Independent School District, Appellee
(137) Santa Rosa Independent School District, Appellee
(138) Shallowater Independent School District, Appellee
(139) Southside Independent School District, Appellee
(140) Star Independent School District, Appellee
(141) Stockdale Independent School District, Appellee
(142) Trenton Independent School District, Appellee
(143) Venus Independent School District, Appellee
(144) Weatherford Independent School District, Appellee
(145) Ysleta Independent School District, Appellee
(146) Connie DeMarse, on her own behalf and as next friend of her children Bill DeMarse and Chad DeMarse, Appellee
(147) B. Halbert, on his own behalf and as next friend of his child Elizabeth Halbert, Appellee
(148) Libby Lancaster, on her own behalf and as next friend of her children, Clint Lancaster, Lyndsey Lancaster, and Britt Lancaster, Appellee
(149) Judy Robinson, on her own behalf and as next friend of her child, Jena Cunningham, Appellee
(150) Frances Rodriguez, on her own behalf and as next friend of her children, Ricardo Rodriguez and Raul Rodriguez, Appellee
(151) Alice Salas, on her own behalf and as next friend of her child, Aimee Salas, Appellee

Albert H. Kaufman

ALBERT H. KAUFMAN
ATTORNEY FOR APPELLEES
EDGEWOOD, I.S.D., ET. AL.

III. REQUEST FOR ORAL ARGUMENT

Appellees agree that oral argument is appropriate in a case of this importance and magnitude.

IV. LIST OF AUTHORITIES

TEXTS AND TREATISES

V. PLAINTIFFS' RESPONSE TO DEFENDANTS' POINTS OF ERROR.

A. **Point of Error No. 1:** The trial court erred in applying strict scrutiny to evaluate the Texas School Finance System; since neither a fundamental right nor a suspect classification is implicated by the Texas system, it was improper for the court to apply this standard of review. (TR.546)

Response: The trial court was correct in applying strict scrutiny to consider the constitutionality of the Texas School Finance System since both fundamental rights and suspect classifications are implicated in this case.

B. **Point of Error No. 2:** The trial court erred in holding that education is a fundamental right under the Texas Constitution, since, for purposes of equal protection analysis, education is not a fundamental right under Texas law so as to subject a governmental classification to strict scrutiny. (Tr. 539-547, 592)

Response: In Texas, under the Texas Constitution, children have a fundamental right to equal educational opportunity, without regard to the wealth of the school district in which they reside.

C. **Point of Error No. 3:** The trial court erred in holding that wealth is a suspect category, since, for purposes of equal protection analysis, classifications based upon wealth are not suspect classifications so as to subject a governmental classification to strict scrutiny. (Tr. 542)

Response: In the context of consideration of the effects of discriminatory school finance system, wealth is a suspect category.

D. **Point of Error No. 4:** The trial court erred in entering judgment that the Texas School Finance System violated the equal protection clause of the Texas Constitution on the basis of its finding that no rational basis exists for the Texas School Finance System, since there is no evidence or in the alternative, insufficient evidence to support this finding. (Tr. 549, 594-98)

Response: There is abundant and sufficient evidence to support the Court's findings on the irrationality of the present Texas School Finance System. The Court's findings of irrationality are fact findings that cannot be reversed under applicable standards of appellate review. The Court's weighing of the Defendants' proffered justifications for the discriminatory system is a fact finding that cannot be reversed under applicable standards of appellate review.

E. **Point of Error No. 5:** The trial court erred in entering judgment that the Texas School Finance System is not an efficient system of free public schools as required by Texas Constitution art. VII, §1, since there is no evidence, or in the alternative, insufficient evidence to support this finding. (Tr. 599-603)

Response: The Trial Court is correct in finding and holding that the Texas School Finance System is not an efficient system of public schools and there was abundant and sufficient evidence to support the finding. The system expends funds where they are not

necessary, does not expend funds where they are necessary and is based upon an irrational structure.

F. **Point of Error No. 6:** The Trial Court erred in finding that the Texas School Finance System does not provide an adequate education, since there is no evidence, or in the alternative, insufficient evidence to support this finding. (Tr. 558-73)

Response: There is ample and sufficient evidence to support the Court's findings on adequacy, though the Court's judgment would be valid regardless of that finding.

G. **Point of Error No. 7:** The Trial Court erred in holding that the equal protection clause of the Texas Constitution mandates equal access to funds by local school districts. (Tr. 502, 538)

Response: The trial court was correct in holding that the equal protection clause of the Texas Constitution mandates equal access to funds by local school districts so that the students within those districts are granted equal educational opportunity as guaranteed by the Texas Constitution.

H. **Point of Error No. 8:** The trial court erred in defining equal protection in terms of the standing of school districts rather than the rights of students. (Tr. 536, 503)

Response: The trial court was correct in defining equal protection in terms of standing of both school districts and students themselves. Plaintiffs include children and parents whose standing is not questioned. Because of the use of school districts by the state in providing for the education of students, school

districts do have standing to redress the constitutional shortcomings of the school finance system in the context of this school finance case.

I. **Point of Error No. 9:** The trial court erred in finding that the Texas School Finance System violated the due process clause of the Texas Constitution, art. I, §19 and 29, since there is no evidence, or alternatively, insufficient evidence to support such a finding. (Tr. 503, 609)

Response: There is ample and sufficient evidence to support the court's finding of violation of the due course of law clause of the Texas Constitution.

J. **Point of Error No. 10:** The trial court erred in finding that boundary lines of school districts in Texas are irrational and unconstitutional, since boundaries are a political question not subject to judicial review. (Tr. 502, 573-75)

Response: The court was correct in finding that the boundary lines of school districts in Texas do not provide a rational basis for the discrimination of the school finance system of the state. There is no holding that the lines themselves are unconstitutional, but only that the lines, in the context of the Texas School Finance System, do not provide a defense of justification by the state under any equal protection standard.

K. **Point of Error No. 11:** The trial court erred in holding that all school taxes are state taxes since art. VIII, §1 of the Texas Constitution prohibits a state ad valorem tax. (Tr. 547)

Response: The Trial Court is correct in its holding that all school taxes are state taxes based upon the

factual record in the case and the requirement under the Texas Constitution that the Legislature establish and make a suitable provision for education in the state.

L. **Point of Error No. 12:** The trial court erred in finding that the Texas School Finance System serves no compelling state interest because such a finding is incorrect as a matter of law, or alternatively, is against the great weight and preponderance of the evidence. (Findings, D, p.40-56 at Tr. Vol.III, p.575-592)

Response: Defendants have not briefed Point No.12 and have therefore waived it. Alternatively, the Trial Court was correct in its finding that the state has not shown a compelling state interest for the Texas School Finance System both as a matter of law and as a matter of fact on the basis of the record before it.

VI. PLAINTIFFS-APPELLEES CROSS POINTS OF ERROR

The Plaintiffs allege the following cross points of error in the Court's findings of fact, conclusions of law and judgment:

1. **Cross Point of Error No. 1:** The court erred as a matter of law in determining that the Defendants are immune from liability for attorneys fees (TR.506-507, TR. 606-607).

2. **Cross Point of Error No. 2:** The Trial Court erred as a matter of law in not entering judgment for Plaintiffs and Plaintiff-Intervenors against State Defendants for attorneys fees and costs in the amounts found by the trial court to be reasonable and necessary (Tr.506-507, TR.606-607).

3. **Cross Point of Error No. 3:** The Trial Court abused its' discretion by denying attorneys fees against Defendant-Intervenor school Districts and erred as a Matter of Law by not rendering judgment for fees and costs against Defendant-Intervenor School Districts (TR.506-507, TR.606-607).

VII. PRELIMINARY STATEMENT

The Texas School Finance System violates the Texas Constitution and causes permanent educational damage to the one million school children attending low wealth schools. An ineffective state funding program superimposed on school districts of widely varying ability to raise funds-both factors under control of the State - causes the discrimination and no rational or compelling justification for the discrimination has been shown.

Plaintiffs [1] file this brief in support of the District Court's judgment that the Texas School Finance System violates the Texas Constitution.

We request that the court review the Defendants' brief in light of the District Court's carefully reasoned and documented decision. The Defendants have sought to ignore the findings of the trial court and sought to replace them with matters both in and outside [2] the record of the case. Plaintiffs will

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[1] Plaintiffs' brief and Plaintiff-Intervenors' briefs will supplement one another except as expressly noted. Plaintiffs and Plaintiff-Intervenors will respond to the four briefs of the Defendant parties (State brief, Andrews Intervenors brief, Eanes Intervenors brief and Irving Intervenors brief). Plaintiffs will respond to each of the Defendants' points of error briefly and refer the court to later sections of the brief in which each one of the points of error will be discussed in greater detail. Unless a distinction of the parties is necessary, Plaintiffs will refer to all of the Defendants and Defendant-Intervenors as Defendants and refer to the Plaintiffs and Plaintiff-Intervenors as Plaintiffs.

[2] State brief includes Chart A and Chart B that are not in evidence, not related to facts in evidence, misleading and include matters found irrelevant by the District Court. They should be ignored. State appendix includes "Key Elements of Texas Public School Finance -- A Nontechnical Outline;" also not

concentrate on the findings of the Trial Court and will rely on additional matters in the record to rebut Defendants' factual allegations and to give a background for the District Court's fact findings.

VIII. STATEMENT OF FACTS

A. Introduction

The Court found that under a constitutional system, "each student by and through his or her school district would have the same opportunity to educational funds as every other student in the state, limited only by discretion given local districts to set local tax rates. Equality of access to funds is the key and is one of the requirements of this fundamental right" (TR. 538).

Plaintiffs produced evidence and the Court found that the school finance system in Texas is inequitable as a whole and at its extremes in terms of wealth per pupil, expenditure per pupil, tax rates and the effect of the system on children in low wealth districts (Id).

B. Variation in Wealth Per District and the Importance of This Variation.

School districts in Texas have from $20,000 of property wealth per student [3] to $14,000,000 of property wealth per student-a ratio of approximately seven hundred to one (TR.548). The 1,000,000 school children in the wealthy districts have two and a half times as much property wealth per student as do the

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in the record, inaccurate and self serving. Each should be removed from the record and ignored.

[3] Student in average daily attendance (ADA); state formulas and the analyses of all parties to the case dealt with ADA based on the best four weeks of eight weeks average attendance. For purpose of this brief "students" means "students in ADA."

1,000,000 students in the bottom range of wealth. The 300,000 students in the highest property wealth school districts (10% of the total students) have 25% of the state's total property wealth to support their education; on the other hand, the 300,000 students in the lowest wealth districts have only 3% of the state property wealth (TR.549). This difference is important because of the amount of revenues that can be raised from the property base. The amount of revenue that can be raised in a school district is directly proportional to the amount of property wealth per student in the district. With a one cent tax rate, the richest district in the state can raise $1,400 of revenue and the poorest district can raise $2. Highland Park School District in Dallas County can raise $100 for each $.01 tax rate and Wilmer-Hutchins District in the same county can raise less than $10 with a $.01 tax rate. There is a tremendous variation in ability to raise tax monies in districts in the state (P.X. 104S, 106S, 108S, 110A, 114A). The state purports to deal with these varying abilities of school districts through its Foundation School Program. However, that program deals only with part of the revenues and the expenditures actually raised and spent in local school districts and does not nearly compensate for the wide variations in property wealth and the concomitant wide variations in ability to raise revenue for students within the districts (Id.)

3. Expenditures

The District Court found that "the amount of money spent on a student's education has a real and meaningful impact on the

educational opportunity offered that student" (TR.548). Low wealth districts that are spending less are actually districts that need to spend more per student than do the wealthy districts. For example, the 150,000 students (5% of total students in the state) in the wealthiest districts have more than twice as much spent on them as the 150,000 students at the lower end of school district wealth spectrum and the 600,000 students (20% of total students) in the state in the wealthy districts have two-thirds more spent on their education than the 600,000 students in the poorest districts (TR. 551).

The Court based findings upon the expenditures per student both in terms of the "raw numbers" and in terms of "weighted students" [4] (TR.551 & 552). Using the state's own formulas for the extra cost of educating children in programs such as Special Ed., Vocational Ed., Compensatory Ed., etc., and the extra cost of educating children in very large or very small districts, the Court found that the discrepancies in expenditures in the state are just as great or greater after allowing for the special needs of students in all districts rich and poor [5] (TR.551 & 552; P.X. 103S, 105A, 115A).

D. Tax Rates

"The range of local tax rates in 85-86 was from $.09 to

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[4] The weighted student concept acknowledges that some students, e.g. special education or vocational education students, are more expensive to educate than others.

[5] Plaintiffs included in their formulas even the extra cost of running educational programs in urban and sparsely populated rural areas, costs associated with the size and location of the school districts rather than the extra educational cost of the individual students themselves.

$1.55 per $100 evaluation" (TR.552). In other words, Texas has created and enforced a school finance system that allows tax payers in one district to buy more for $.09 than tax payers in another district can buy for $1.55 per hundred dollar evaluation of property. [6] Again this variation is not only at the extremes. The Court considered the effect of these tax rate variations on the state as a whole and found that in general poor districts pay higher taxes than wealthy districts (TR.553). The Court considered the variation in tax rates on large numbers of districts and students at the wealthy end of the wealth spectrum and at the poor end of the wealth spectrum. The Court found that hundreds of thousands of families live in districts and pay over $1.00 per $100.00 of property wealth and hundreds of thousands of families live in districts where they pay less than $.50 per $100 of property wealth (TR.553). In terms of actual taxes paid on a $80,000 house after reductions for homestead exemption, the Court found a range of from $1,106.00 in Crystal City ISD, a very poor district, compared to $38.00 in Iraan-Sheffield, a very wealthy oil and tax haven district (TR.554; P.X. 205).

Though the state will argue that the school finance system offsets this tremendous difference in wealth per pupil and ability to raise funds in districts, the District Court found that under the state's system, if every district in the state were making the average total tax effort, the students in the richest districts (5% of students) would still have twice as much

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[6] The district with .09 tax rate spent $13,429 in 1985-86 and the district with 1.55 tax rate spent $4,245 in 1985-86 (P.X. 215 & 216; 103c)

spent on them as the students in the poorest districts (5% of students), and the students in the richer districts (20% of students) would have fifty percent more spent on them than do the 20% of students in the poorest districts (TR 558-559). The Court looked at the system both at its extremes and at 20%, 40%, 60%, 80% and 100% of all the students in the state; under each comparison students in the poor districts suffer compared to students in the wealthy districts. The Court looked at the system both under the present tax rates in the school districts and under a model in which all districts were assumed to have the same tax rate but with their present property wealth and the present school finance system (TR.557-558). Every comparison showed the comparative lack of resources available to students living in the low wealth districts.

E. Effects of Insufficient Funds

The Defendants ignore the record in the case and the findings of the Trial Court when they seek to convince this Court (as they could not convince the Trial Court) that the only way to measure the quality of educational programs is to look at TEAMS scores and conclusory statements by state officials regarding accreditation and curriculum. The Court heard the Texas Commissioner of Education, two Deputy Commissioners involved with school finance and accreditation, several out of state experts on "money doesn't make a difference" theories, in- state experts, as well as superintendents from poor and rich districts and individuals from poor districts. The Court came to the conclusion that it really does hurt kids when the districts that

they attend do not have the ability to fund their educational programs (TR.558-562). The Court agreed with Dr. Kirby, the Texas Commissioner of Education, who stated that "as in so many things, in education, you get what you pay for" and "the quality of our education system is directly related to the amount of money spent on it" (TR.558). The increased financial support available to wealthy school districts allows them to "offer much broader and better educational experiences to their students," such as more extensive curriculum, co-curricular activities, training materials, libraries, staff specialists, teacher aides, counseling services, drop-out programs, parenting programs, smaller class sizes, and better teachers and administrators. (TR.559). The Court also found that many low wealth districts cannot afford to provide an adequate education for all their students and the system of public education in Texas does not provide an adequate education to students attending low wealth districts (TR.560). [7]

F. Facilities

The revenue and expenditure figures used by the Defendants in their briefs do not include the cost of facilities. The state does not even purport to pay for any of the cost of facilities and the facilities must be paid for completely from local district funds with tremendously disparate ability between low wealth and high wealth districts to pay these funds (TR.561-562). The Court found that "low wealth districts cannot afford

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[7] The adequacy question will be discussed in a separate part of this section of the brief but it is clearly tied to the availability of funds (TR.560).

to and do not provide as high a quality of facilities as do high wealth districts," and that "this has a negative effect on the educational opportunity of children in these districts" (TR.561-562). The cost of new facilities will skyrocket when the new smaller class size requirement for grade 3-4 goes into effect in 1988-89.

G. Concentrations of Low Income Students in Low Wealth Districts

There is a great concentration of low income students and low income families in the low wealth districts (TR.562-565). This places an increased burden on these low wealth districts to provide a more comprehensive educational program rather than the less comprehensive program they are able to offer under the present school finance system (TR.562-563). For example, although 36% of all students in Texas schools are low income, 85% of the students in the lowest wealth districts (5% of students) are low income and 60% of the students in the low wealth districts (25% percent of students) are low income (TR. 563; P.X. 48). There is a concentration of below poverty families in the lowest wealth districts. The median family income in the lowest wealth districts in 1980 was $11,590 compared to the state median family income of $19,760 (P.X.48). (Appellee Edgewood Appendix)

H. Effect of School Finance System on Particular Texas School Districts

Five low wealth school district superintendents and residents of three school districts testified on the effect of the entire system of school finance on their individual districts

and on the students within their districts.

1. The San Elizario district is a district of approximately 1000 students in rural El Paso County. San Elizario in 1985-86 had a tax rate of $1.07 per hundred dollars evaluation (compared to the average in the state of $.66 (TR.549). San Elizario "cannot provide a fully adequate curriculum for its students;" it offers no foreign language, no pre-kindergarten program, no college preparatory program and has virtually no extra-curricular activities (TR.560). The San Elizario District has had tax rates of $1.96 (1984), $1.90 (1985) and $1.29 (1987) in other recent years (S.F. 3391). The district cannot meet the class size requirements of state law. It can provide only a "general diploma" and not the "advanced" or "advanced with honor" diplomas necessary for college (S.F. 3403). San Elizario has 96% low income students compared to 36% for the state as a whole (TR.563).

Over one-third of the teachers in the San Elizario District are not certified to teach the areas in which they are teaching (S.F. 3399). In addition to being unable to offer foreign languages the school district offers no chemistry, physics, calculus, honors courses, and offers geometry and algebra II in alternate years (S.F. 3400). The district cannot afford and does not offer band, football teams, choir, or debate (S.F. 3404-3405). The district has no library at the middle school. In 1985 the roof caved in at the high school because the district could not afford to repair it (S.F. 3409, 3410). The district teaches kindergarten in a fifty year old adobe house (S.F. 3410).

The San Elizario district has to spend money to build its own sewage and water systems because the district is not in any city sewage and water systems; this will cost the district $250,000 in a district that can only raise $2,700 for each penny tax rate (S.F. 3411-3412).

The superintendent of the San Elizario district, based on his many years of experience in the district and previous experience in other school districts and the armed forces, concluded that "children going to school in [San Elizario] district are not given an equal opportunity to obtain the benefits of an education under the circumstances existing in the district today" (S.F. 3415). He also concluded that the district does not have "an opportunity to give an equal education or an adequate education to the kids in the district" (S.F. 3417). The San Elizario District has sought to consolidate with surrounding districts but the surrounding districts have not wanted to consolidate with San Elizario; and the superintendent of San Elizario could understand why other districts would not want to add on the burden of San Elizario's low tax base and high number of "high cost students" (S. F. 3416).

The San Elizario District has at all times been accredited by the Texas Education Agency (S.F. 3396).

2. The superintendent of the North Forest ISD in Harris County described the effects of the Texas Finance System on a large urban low wealth district. The court found that "North Forest, a black (ninety percent) district in Harris County has $67,630 of property value per student while the adjoining Houston

I.S.D. has $348,180 (TR.549). North Forest had a tax rate of $1.05 and cannot "provide a full range of educational offerings to their students" (TR.557). "North Forest ISD in Harris County had the highest failure rate in Texas on the TECAT exam [an exam of basic skills for working teachers in the district], but is unable to compete with its wealthier neighbors for teachers because it cannot match their salary offerings" (TR.560). The North Forest District has raised its tax rate in 1986-1987 from $1.07 to $1.17 (S.F. 2588). The tax rates in North Forest have been consistently over twice the state average tax rates;[8] yet the district pays a basic teacher salary of $4,500 less than adjoining districts (S.F. 2590-2599). The district has suffered significant problems in facilities, hiring quality teachers, recruiting staff, and if the district were "adequately funded" the district could resolve these problems (S.F. 2599, 2600). With regard to hiring teachers the superintendent of North Forest stated "so, money does make a difference. It forces the North Forest type districts in many cases to settle for an alternative after another district has made its selection" (S.F.2601). Despite the high tax rate in the North Forest District, the district still spent several hundred dollars less per student than the state average [9] (S.F. 2602). The fact that the North Forest district has such a high tax rate is a concern to the

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[8] 1978-$1.80, 1979-$1.80, 1980-$1.75, 1981-$1.75, 1982-$1.26, 1983-$1.36, 1984-$1.11, 1985-$1.12, 1986-$1.12, 1987-$1.17.

[9] $500 a student in average daily attendance is approximately $11,000 a classroom.

business community and a negative factor discouraging businesses from putting their facilities in the district [10] (S.F. 2611-2612). The inability to pay as high salaries as surrounding school districts hurts the quality of the teaching force in the North Forest district, both in terms of attracting and keeping school teachers (S.F. 2611-2612, 2620). The district will be forced to build many new buildings in the future and is already tied in to a high tax rate (S.F. 2625). Thirteen of the sixteen campuses in the district need substantial improvements (S.F. 2626). The condition and maintenance of facilities have a significant effect on the learning environment in the school district (S.F. 2628). The children in the North Forest district do not have "an equal opportunity to learn or progress in our society to the opportunity of kids in other wealthy districts" (S.F. 2634). In North Forest the opportunity 'is not equal. It is not equal at all" (S.F. 2634). Mr. Sawyer, the superintendent of North Forest, described the much more difficult time that poor districts have in trying to meet new state mandates with the low wealth districts' insignificant tax bases (S.F. 2663-2664). In North Forest the funding is still "inadequate in relationship to the high cost of education and the competition that we face in the county area" (S.F. 2715). Texas is "funding in a level substantially below what experts know the basic educational program costs" (S.F. 2725). The North Forest I.S.D. has at all times been accredited.

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[10] This is consistent with the Court's findings of the cycle of poverty into which low wealth districts are trapped (TR. 575).

3. Both a parent and the superintendent of Socorro ISD in El Paso County testified before the Court. The Court found that "Socorro ISD in El Paso County because of its high growth rate and inadequate facilities has been forced to build new buildings and the district now is unable to make payment on principal and faces potential bankruptcy" (TR. 560). The Socorro district is growing very rapidly at a rate of 12% to 15% increase in average daily attendance per year (S.F. 763). Most of the growth in the Socorro district is recent arrivals from Mexico. These recent arrivals live in "[colonias]" (S.F. 766). These "colonias" have no water, electricity, fire protection, police protection or good roads (S.F. 766). Seventy percent of the district's students come from poverty level families (S.F. 768) This causes the district to have very high costs for its students (S.F. 768, 769). Mr. Sybert, the superintendent of the Socorro ISD and an educator for thirty-five years, testified that "I can't say that the total measure of success in our school district is based on the TEAMS test that certainly is not it" (S.F. 773). The tax rate for bonds in Socorro is $.50 compared to $.11 for the state as a whole (S.F. 782). The Socorro district has refinanced its bonds and presently is paying interest only on the bonds and not principal. At the same time the district is having to build two new buildings every year to keep up with the growth. The district is heading for "imminent financial collapse" (S.F. 783). The Socorro district has been on waivers, i.e. has not been able to meet state requirements on class size (S.F. 787). The district has high school English teachers that have 175 students

a day (S.F.789). These large classes have a negative effect on the education of the students (S.F. 790). The superintendent of Socorro described the need for very small classes such as one teacher to every twelve or fifteen students in the poorest areas of the school district (S.F. 794); but unfortunately he cannot afford to do that (S.F. 794). The district has one counselor for 7,000 students in grades K-8 and the district has only had this counselor for two years (S.F. 796). The Socorro district--with all of its low income and limited English speaking children-cannot afford to offer a full day kindergarten but only a half day kindergarten (S.F. 805). The built-in problems of lack of funds and the cycle of poverty were expressed by the superintendent of Socorro who testified that the district obtains its school buses from a state agency that has bought the buses from other school districts which can no longer run the buses economically; in other words because of lack of "upfront money" Socorro buys old buses which are more expensive to operate in the long run (S.F. 808). Since there is no running water or sewage lines to a new school building being built in Socorro the district undergoes much greater expense to obtain water from other sources and to set up its own sewage treatment processes (S.F. 811). The school district only sends ten percent of its students to college (S.F. 811). A recent study showed that not one of the graduating students from Socorro graduated from college in a four year period (S.F. 811). The district cannot afford the college preparatory courses that it needs because it cannot afford small classes (S.F. 813-814), and this has a

negative effect on the educational opportunity of the children in the district (S.F. 814). The Socorro district cannot meet Texas Education Agency standards in terms of laboratory facilities or libraries (S.F. 824). For the first two years of H.B. 72, the Socorro district could not even afford to have a pre-kindergarten program because of lack of classroom space and lack of funds to build new classes (S.F. 834); this had an negative effect on the educational opportunities of the children (S.F. 834). Socorro district has a large number of teachers who are not certified to teach the courses they are teaching and this could be rectified with additional funding (S.F. 836). The superintendent of Socorro concluded that based upon his thirty-five years of educational experience and experience with TEA requirements that the district cannot afford the basic educational requirements of the youngsters they have in their school (S.F. 838), and the problem has "everything to do with money it sure does" (S.F. 839). As Mr. Sybert said:

> I need to buy quality teachers in a competitive market, I need to buy things for youngsters to use like library books and science laboratories, I need to buy extended time like summer programs and afterschool tutorials. All of the things and all of the services that I want to provide for my kids cost money

(S.F. 839). According to the state's own statistics, the pupil-teacher ratio in Socorro is 21.9 to 1 compared the state average of 17.5 to 1 and the professional salary per pupil in Socorro district is $1,200 compared to $1,700 for the state (S.F. 914, P.X. 190). Because Socorro has such a high tax rate to pay off bonds, it is forced to have a lower maintenance and operations tax to pay for normal school expenses (S.F. 928).

The Socorro district has at all times been accredited.

I. Adequacy

Defendants have sought to use examples of accreditation, curriculum, textbook and TEAMS test scores as examples of the "adequacy" of the state's program. The adequacy findings are not even necessary to uphold the court's findings on violation of Equal Protection clause and of the standards of Article VII of the Texas Constitution. Nevertheless, the findings and record document the results of the inadequate school finance system in the state.

1. The Court's Findings on Adequacy

The District Court made extensive findings on the inadequacy of the Texas School Finance System for low wealth districts and students attending those districts (TR.558-560). The Court also summarized some of the state "requirements" that low wealth districts cannot meet (Tr.560-561), and the historical inadequacy of the system (TR.565-565). The Court also gave a detailed explanation of the weaknesses of the Foundation School Program formulas (TR.565-569), especially the inadequacy of the basic allotment and the remaining parts of the formula which are based on the basic allotment (TR.565-567; 571-573).

2. Other Record Evidence on Adequacy

The Court's findings on the inadequacy of the educational system in low wealth districts is also supported by other evidence in the record. Plaintiffs' Exhibit 235, a booklet produced by Dr. Kirby, Texas Commissioner of Education, and Dr. Walker, a business official in the Ector County School District (an above average wealth district) stated the following: "no

state school finance model that relies heavily upon local property taxes [49% of the total Texas school finance system is local property taxes, 42% is state money] as a source of revenue can ever hope to gain either equity or adequacy" (P.X.235, p.65). Dr. Kirby and Dr. Walker also stated that "the adequacy of state support of the Texas Foundation Program is still questionable, despite increases in state aid under H.B. 72, and the provisions for 1985, 1986, 1987, are inadequate and will require legislative review and action in the 1987 session" (P.X. 235, p.65).

Dr. Jose Cardenas, former superintendent of the Edgewood I.S.D., a nationally known educational expert (P.X. 94) and founder and Director of I.D.R.A. (which prepared the recent state dropout study) testified that the inequities in school finance have led to a denial of equal educational opportunity to children living in low wealth school districts in the State of Texas; Dr. Cardenas also testified to the fact that higher wealth districts have more experienced, better trained and more degreed and higher paid school teachers and administrators than do low wealth districts (S.F. 3463,3464); that high wealth districts have better quality facilities (S.F. 3465); and that factors such as "teacher quality, teacher numbers, administrative support quality, facility quality, do have an effect on the education that can be offered to children in school districts" (S.F. 3465); he testified about the extra cost and extra programs necessary for low income children and the concentration of these children in low wealth districts (S.F. 3465, 3466). Dr. Cardenas

testified that "the higher the wealth of the school district, the lower the dropout rate" (S.F. 3486).

Dr. Cardenas concluded that in Texas "inequities in school finance has led to a denial of equal educational opportunity to children living in low wealth school districts in the State of Texas" (S.F. 3483), and that the effect of the Texas School Finance System on children attending school in low wealth districts has been:

> diminished performance in terms of achievement, I think that increased dropouts, I think that there is subsequent lesser enrollment in college and pursuing academic studies, I think it is handicapping in terms of employment and certainly handicapping in terms of quality of life, and I think it has a detrimental effect upon those children in subsequent years throughout their whole life (S.F.3484).

Dr. Richard Hooker, who has participated in the development of school finance legislation in Texas for twenty years, was a member of the state appointed accountable cost committee, and was involved in the drafting of H.B. 72 finance provisions. He testified about the inadequacy of the school finance system as related to the education available in low wealth districts. Dr. Hooker testified that children in low wealth districts do not have access to substantially equal programs and services in education in the state and that this is caused by the lack of equity in the state foundation program and the existence of widely varying local tax bases (S.F. 148). Dr. Hooker described the great difficulty the property poor school districts have in providing a quality education (S.F. 181, 182). Dr. Hooker also testified to the inadequacy of the "basic allotment," TEX. ED. CODE §16.101. The state adopted a $1290 basic allotment for

1984-85 and a $1350 basic allotment for subsequent years. The state-appointed committee recommendations were for a basic allotment of $1842 for the 1984-1985 year and a higher basic allotment for subsequent years (S.F. 220, 518). This higher basic allotment figure passed the Senate in the 1984 Special Session (P.X. 50, p.38); the Senate bill passed a basic allotment of $1715 per student in average daily membership (which is the same as $1842 per student in average daily attendance (ADA) (S.F. 220). Dr. Hooker stated that the basic allotment should be $2600 (compared to the actual $1350) in 1987-88 (S.F. 518) and $2800 (compared to the $1350 in present legislation) in the 1988-89 school years in order to have an "adequate system" (S.F. 419).

Dr. Hooker testified on the weaknesses of the basic allotment as well as on the parts of the school finance formula that depend on that basic allotment. As the Court found, the fact the basic allotment is too low ($1,350 compared to $2,000 necessary in 85-86 (TR.569) and $2,600 necessary in 87-88) is exacerbated by the fact that the "add ons" in the school finance formulas are based directly on the basic allotment (S.F. 1440). These tie-ins were noted by the District Court (TR.570-572).

The state seeks to respond to the record on the inadequacy of the system by pointing to "adequacy" in terms of four state standards: curriculum, accreditation, textbooks and TEAMS scores.

a. Curriculum

The state has issued standards of curriculum with three hundred fifty pages of detailed requirements (D.X.23) However,

as found by the district court, "Texas has forty-four professional personnel to review the accreditation as well as compliance with curriculum mandates of the 1063 school districts, the 6,000 school buildings, the approximately 175,000 classrooms and teachers and the 3,000,000 students in the state" (TR.562). The San Elizario superintendent testified that he could not offer even basic courses the state curriculum requires for either the advanced or advanced with honors programs, those necessary for college. His district is still accredited. The state relies on the "TEAMS" [11] to test the curriculum. The TEAMS tests only "minimum basic skills" and does not purport to test all of the elements of the state mandated curriculum. The witnesses Dr. Valverde, Dr. Zamora, Dr. Hooker, Dr. Cardenas and school superintendents addressed the inability of low wealth school districts to have sufficient curriculum, curriculum specialists to organize and implement curriculum requirements, and sufficient supervisory personnel to enforce the curriculum mandates (TR.559).

Defendants' publication entitled "The Status of Curriculum in the Public Schools" (D.X. 66) summarized "concerns about the curriculum" as follows:

> Concerns Regarding Instructional Arrangement: Educators reported inadequate facilities, equipment, and materials needed to implement the new curriculum. Teachers especially are aware that, without adequate funding for the minimum equipment and facilities needed, the success of the new curriculum is jeopardized [emphasis added] (D.X. 66, p.10)

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[11] Texas Educational Assessment of Minimum Skills [emphasis added].

b. Accreditation

The purpose of the accreditation process is not to determine adequacy (S.F.6575-6577).

The same 44 professionals responsible for monitoring the state's curriculum are responsible for monitoring the state's accreditation, and these persons check accreditation status of matters on things such as teacher certificate requirements, school board policies, and financial processes as well as "educational issues such as curriculum." Dr. Bergin testified that probably every school district in the state has the state's requirements waived in one way or another (S.F. 6463, 6570). Seventy-seven percent of districts with accreditation problems are below average wealth districts [12] (S.F.6541). Dr. Bergin testified that 325 (of the state's 1063) districts received waivers of the 22 to 1 maximum class requirement in 1985-86 (S.F. 6454). Districts can also waive the full-day kindergarten requirement (S.F. 6459), the pre-kindergarten program (S.F. 6461), teacher certification requirements (S.F. 6461), and bilingual education program requirements (S.F. 6462).

Dr. Bergin admitted that the new curriculum was not without costs. It had financial implications, as far as facilities, as far as equipment, and as far as materials, that some districts could meet, and others could not meet (S.F. 6519).

One accredited district in Texas has only four students (S.

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[12] 90% of the students in the non-accredited districts are in below average wealth districts (S.F. 6543, 6547 Pl. Ex.215); the only district under the control of a TEA Monitor (Venus ISD) has $90,000 of property per ADA, far below the state average of $250,000 per ADA.

F. 6534); Dr. Bergin, a Deputy Commissioner of the Texas Education Agency said that having a school district with four students doesn't make sense to her (S.F. 6537).

c. Textbooks

The state does give free textbooks to students in the state and outlines materials that are necessary to be included in these textbooks. On the other hand in most school districts many students are not at the grade level they should be, and it is necessary for the local school district to provide textbooks, supplementary materials, supplementary textbooks and supplementary curriculum for these students. These matters are paid out of local school district funds (S.F. 6482, 6484). The sending of textbooks to school districts is no guarantee that the districts have sufficient teachers, classrooms, administration or support to teach all that is in those textbooks. Many students, especially low income students who are concentrated in the low wealth districts, are not at grade level and need extra materials (S.F. 3467; P.X.48 (in appendix).

d. TEAMS

The state rests much of its defense on the use of the TEAMS test as some sort of guarantee of an adequate program in school districts. The TEAMS test only purports to be a test of minimum basic skills and not of the state curriculum as a whole. [13] The

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[13] The twelve legislatively mandated areas of curriculum are:

1. English language arts;
2. other languages, to the extent possible;
3. mathematics;
4. science;
5. health;

State's Long Range Plan for Education noted with regard to the TEAMS test that:

> Although the majority of students pass TEAMS, far too many fail to achieve even the minimum state standards and require remediation.
>
> ...
>
> A further concern is that minimum skills testing is not a wholly adequate measure of learning. As schools concentrate on preparing students to pass TEAMS, they may tend to devote less time to development of analysis, synthesis, and other critical-thinking and problem-solving skills. Tests of reading, writing, and mathematics with a relatively low passing threshold should neither substitute for measures of more sophisticated learning nor limit the curriculum to the tests.

(D.X. 68 at 7-8).

The state's TEAMS data is based on 11th grade TEAMS scores. This is affected by the high drop-out rate, i.e. 35% of students (45% of Hispanic students) have dropped out even before they get to the 11th grade to take the test (S.F.6692; 5312; 5316; 88-89; P.X.49).

The state's own data defeats their argument. The state has shown that students in the lowest wealth districts in the state score at the 40th percentile nationally in math (D.X. 26, p.40),

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6. physical education;
7. fine arts;
8. social studies;
9. economics, with emphasis on the free enterprise system and its benefits;
10. business education;
11. vocational education; and
12. Texas and United States history as individual subjects and in reading courses.

TEX. ED. CODE §21.101 (c)
TEAMS measures minimum skills in reading, writing and mathematics, i.e. minimum skills in No. 1 and No. 3 areas and not in Nos. 2, 4, 5, 6, 7, 8, 9, 10, 11, 12 areas.

34th percentile in reading and 38th percentile in writing, compared to the 59th (math), 51st (reading) and 56th (writing) for the wealthiest districts (D.X.26, p.40). [14]

ARGUMENT

IX. SUMMARY OF ARGUMENT

The system that the Texas Legislature has designed, implemented and allowed to continue for financing the public schools in the state is unconstitutional under the requirements of the Texas Constitution. The Legislature has designed and allowed to continue a structure of school districts with widely varying property tax bases with concomitant differences in ability to provide an education for their children. The Legislature has implemented a system of taxation which exacerbates the existing differences among property wealth bases in these districts. The Legislature has designed a system of supplementing school finance expenditures which does not sufficiently account for the property wealth differences in the state and continues and supports the discrimination caused by the school district structure and the tax structure. The confluence of these acts and failures to act by the Texas Legislature has caused a denial of equal educational opportunity to the children who attend school districts of low property tax wealth per student.

Under the standards of both the Texas Supreme Court and

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[14] The same pattern is shown in the TEAMS scaled scores for October 1985 and October 1986, i.e. scores are lower in low wealth districts and higher in high wealth districts (D.X. 26, p.43).

other state supreme courts which have considered issues of state school finance systems, the Texas School Finance System denies equal protection rights and fails to meet the standards of the Texas Constitution that the Legislature must provide for a "efficient" system of public schools in the state. The Texas School Finance System has a special negative effect on low income students who reside in low wealth districts.

The Court's judgment was tailored to require the Legislature to meet the standards of the Constitution, without having court interference in the details of school financing structure and administration. The Court's judgment merely requires adherence to the Texas Constitution. The Court was within its jurisdictional bounds in requiring conformance by the state to the mandates of the state constitution.

The Trial Court improperly denied attorneys fees and costs to Plaintiffs, but that decision has been subsequently overruled in the T.S.E.U. case. This Court should render judgment to Plaintiffs for attorneys fees and costs.

X. APPELLANTS HAVE NOT MET THEIR BURDENS TO OVERTURN THE FACTUAL FINDINGS AND LEGAL CONCLUSIONS OF THE DISTRICT COURT

Appellants have outlined "no evidence", "insufficient evidence," "matter of law," and "against the great weight and preponderance of the evidence" points of error. Though the standards of review for these different errors vary somewhat, the basic standard is clear. The District Court's factual findings are to be given great deference and only overturned where the Appellants have met their burden to show clear and harmful error.

A. No Evidence

When reviewing Appellants' no evidence points regarding "rational basis" and "due process", this Court "must consider only the evidence and the inferences tending to support the finding and disregard all evidence and inferences to the contrary." Garza v. Alviar, 395 S.W. 2d 821, 823 (Tex. 1965); Stafford v. Stafford, 726 S.W. 2d 14,16 (Tex.1987). If there is more than a scintilla of evidence, the "no evidence" challenge fails. Id. Appellants can prevail only if they show that the evidence is so weak as to do no more than create a mere surmise or suspicion of its existence." Kindred v. CON/CHEM, Inc., 650 S.W.2d 61, 63 (Tex.1983). The evidence is more than a scintilla "if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds as to the existence of the vital fact." Id.

B. Matter of Law

In order to prevail on their "as a matter of law" errors, Appellants must show both "no evidence" and that the contrary finding is established as a matter of law. Holley v. Watts, 629 S.W.2d 694, 697 (Tex.1982).

C. Insufficient Evidence

In considering the "insufficient evidence" points, this Court "must consider and weigh all the evidence, and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." Cain v. Bain, 709 S.W.2d 175, 176 (Tex.1986). The District Court's findings cannot be reversed just because they do not "point

'unerringly' to the conclusion" or because the evidence was "much too slight and indefinite." Id.

The Appellate Court is not a fact finder and cannot pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. McGalliard v. Kuhlman, 722 S.W.2d 694 (Tex.1986); Clancy v. Zale Corp., 705 S.W. 2d 820, 826 (Tex.App-Dallas 1986, writ ref'd. n.r.e.)

D. Matter of Law and Against the Great Weight Points

Appellants:

> as a matter of law, must overcome two hurdles. First, the record must be examined for evidence that supports the court's findings, while ignoring all evidence to the contrary. If there is no evidence to support the fact finder's answer, then secondly, the entire record must be examined to see if the contrary proposition is established as a matter of law.

Holley v. Watts, 629 S.W. 694, 696 (Tex.1982), reh. denied, Id.; McGalliard, id. at 697.

E. Special Significance of Fact Findings in Cases Involving Asserted State Objectives in Equal Constitutional Law Cases

In Texas State Employees Union v. Tex. Dept. of MHMR, 31 Tex.Sup.Ct.J. 33 (Tex.1987), the Texas Supreme Court considered the role of the trial judge in assessing the state's stated objectives in defense of a constitutional challenge. The Supreme Court reviewed the State's asserted justification for the polygraph policy and held that the "admittedly important" goals must be viewed "in light of the standard we have established;" Id. at 35, and that:

> [F]actual determinations as to the nature of the state's objective and the reasonableness of the means used to achieve it are properly made by the trial court.

Id.

The findings referred to were "that the Department's polygraph policy was not justified by the public interest" and that the Texas Dept. of MHMR "serves a different function and stands in a different posture in regard to the public as compared with a police department." Id.

In this case the Trial Court found the asserted justifications of "local control," "district boundaries" and "community of interest" to be insufficient justifications for the Texas School Finance System (TR.538,573,575-77).

F. Applicability in This Case

This case is one to which these legal standards apply especially strongly. This was a ten week trial. The testimony of both experts and lay witnesses was subject to painstaking cross-examination. The trial judge heard each of the Plaintiffs' two major experts (Hooker and Foster) cross examined for several days and saw each defend the exhibits introduced to the Court. On the other hand the Court also heard the Defendants' expert Verstegan agree that an earlier draft of her paper (P.X.96) included opposite conclusions damaging to Defendants' case which were deleted in the final draft after consultation with Defendant officials (S.F.4572,4575,4580,4587,4591-4598); that Defendants did Verstagen's computer work (S.F.4582,4598); and that her work

was based on improper data [15] (S.F.4446-4450).

The Court also questioned both Plaintiffs' and Defendants' witnesses, allowed an open development of the record and heard tens of hours of argument during the evidence section of the trial.

Clearly the judge credited some witnesses' testimony and not other witnesses' - the sole province of the finder of facts.

XI. ALONG WITH INDIVIDUAL PLAINTIFFS, PLAINTIFF SCHOOL DISTRICTS HAVE STANDING IN THIS LAWSUIT

Plaintiffs include twenty five families and twelve school districts. None of the Appellants questioned the standing of the parents, both on behalf of their children and as taxpayers, to bring this lawsuit.

Appellants question the standing of school districts to bring this lawsuit. The question is not an important one since the issues are before the court as presented by the individual Plaintiffs and the result of the decision will be the same. It is correct that the judgment does speak in terms of the ability of school districts to provide an educational program (TR.502), but the findings of fact and conclusions of law express the duty of the state to provide an equal educational program to students in the state (TR.538). The judgment's concentration on school districts rather than children is necessary because the school districts are the vehicle that the state uses to implement its

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[15] Dr. Verstagen's report was based on the use of a Price Differential Index that was not the one actually used in 1985-86, the year of her study, i.e. the wrong numbers were used for every school district in the state (S.F.4446-4450).

educational program.

School districts in Texas do have a right to bring an action against the state to allege violations of constitutional rights. Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979), cert. denied 444 U.S. 827 (1979). The supreme courts of other states have specifically approved of the standing of school districts to bring school finance challenges against their state school financing systems. Seattle School Dist. No. 1 of King County v. State, 585 P.2d 71 (Wash.1978); and Washakie Co. Sch. Dist. No.1 v. Herschler, 609 P.2d 310, 317 (Wyo.1980). The Arkansas Supreme Court, while not ruling specifically on the issue, continuously spoke of the rights of school districts to equal protection. Dupree v. Alma School District, 651 S.W.2d 90 (Ark.1983). The United States Supreme Court has spoken both of the right of school boards to bring lawsuits against states and of states to bring lawsuits on behalf of their residents. Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923 (1968); Pennsylvania v. New Jersey, 426 U.S. 660, 96 S.Ct. 2333, (1976).

Texas has given school districts the right to bring lawsuits against the State of Texas in the courts of Travis County. Tex. Educ. Code Ann. §11.13(c).

The "equitable estoppel argument" of the Defendants is imagination at its best. Under that standard, recipients of state welfare benefits, medical services, or city or county benefits could not sue the government since the recipients have obtained some benefit from those programs. The cases relied on by the Defendants are commercial litigation cases where the

recipients had special contracts or licenses from the government and could not sue the government over the terms of those contracts. They are irrelevant to the case before us.

XII. CHILDREN IN TEXAS HAVE A FUNDAMENTAL RIGHT TO EQUAL EDUCATIONAL OPPORTUNITY WITHOUT REGARD TO THE WEALTH OF THE DISTRICTS IN WHICH THEY RESIDE

A. Introduction

An analysis of holdings of the Texas Supreme Court, other state supreme courts, the U.S. Supreme Court, and the langauge and structure of the Texas Constitution lead to the conclusion that in Texas education is a fundamental right in the context of a challenge to the total system of finance of public schools in the state. In Stout v. Grand Prairie I.S.D., 733 S.W. 2d 290, 294 (Tex. App.-Dallas 1987, writ ref'd. n.r.e.), the Court held that:

> Public education is a fundamental right guaranteed by the Texas Constitution. TEX. CONST. art. VII.

We agree.

B. Federal Case Law

The Trial Court's conclusion that education is a fundamental interest under the Texas Constitution was buttressed, in part, by its reading of the United States Supreme Court's opinions in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973) and Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982). An analysis of those cases demonstrates that the Court was faithful to the test set forth in Rodriguez (and re-iterated in Plyler) for determining a fundamental interest; and

furthermore the Court was well within the bounds set forth in Plyler for exercising a mid-level of scrutiny of the proffered excuses for Texas' "chaotic and unjust" scheme of school finance. The Appellants' briefs quote copiously from Rodriguez dicta but for the most part ignore both the language of the specific Rodriguez test and also the context of the Rodriguez decision.

In Rodriguez the Supreme Court was called upon to address the wide disparities in funds available to Texas school districts under the Equal Protection Clause of the United States Constitution. The Court's analysis turned upon the question whether education was a "fundamental interest" under the Federal Constitution. If it was, then strict scrutiny would be applied; if not, a rational relationship test would be used. The majority felt that "the key to discovering whether education is fundamental [is] whether there is a right to education explicitly or implicitly guaranteed by the Constitution." The Court concluded: "Education is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."

The Texas Constitution, unlike the Federal Constitution, contains an explicit Education Article setting forth the essential nature of education in Texas and the Legislature's mandatory duty to establish suitable provision for its support and maintenance. Tex. Const. Ann. art. VII §1. Citing similar explicit references in its own Constitution, the Wyoming Supreme Court in a post-Rodriguez case concluded: "In light of the emphasis which the Wyoming Constitution places on education there

is no room for any conclusion but that education for the children of Wyoming is a matter of fundamental interest." Washakie Co. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 317 (Wyo.1980). The West Virginia Supreme Court stated: "Certainly, the mandatory requirement of a thorough and efficient system of free schools, found in Article XII, Section 1 of our Constitution, demonstrates that education is a fundamental constitutional right in this State." Pauley v. Kelly, 255 S.E.2d 859, 878 (W.Va.1979).

The Appellants essentially argue that the Trial Court should have ignored the specific Rodriguez test of "explicit or implicit" textual reference to education, and instead focussed on dicta in Rodriguez which explained the reluctance of the United States Supreme Court to render an Equal Protection decision on a matter of local educational financing. The Appellants' Rodriguez discussion comes down to wanting the Texas courts to be rigidly bound by the federalism concerns in Rodriguez while at the same time ignoring Rodriguez' specific and unambiguous test for determining a fundamental interest under the Equal Protection Clause.

Following Rodriguez, the Supreme Court again looked at a Texas education statute challenged under the Equal Protection Clause in Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982). The case concerned §21.031 of the Texas Education Code which restricted free public education to legally admitted alien children (thus requiring full tuition for alien children not legally admitted to the United States). Although the Appellants choose to characterize Plyler as a case involving aliens and not

a case "relating to education," (Eanes brief p.8) any reasonable reading of Plyler dismisses this characterization. The Supreme Court noted that although education was not a "right" granted under the United States Constitution:

> Neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Plyler, 102 S.Ct. at 2397.

> In determining the rationality of Section 21.031, we may appropriately take into account its costs to the nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination ... can hardly be considered rational unless it furthers some substantial goal of the State.

Id. at 2398.

Mr. Justice Blackmun in his concurrence made the point even clearer: "Only a pedant would insist that there are no meaningful distinctions among the multitude of social and political interests regulated by the States, and Rodriguez does not stand for quite so absolute a proposition." Plyler, id. at 2403.

Thus Plyler established, post-Rodriguez, a middle level of scrutiny for Federal Equal Protection analysis of education-related classifications. Plyler makes it crystal clear that education should not, as Appellants so strenuously assert, fall within the general rules for interpreting social and economic legislation. The unique and essential nature of education continues to be recognized in Federal Equal Protection analysis.

Another recent Supreme Court case makes clear that Rodriguez

did not settle for all time all Federal Equal Protection Clause tests of state school financing actions. In Papasan v. Allain, 106 S.Ct. 2932 (1986), the question concerned relatively small differences in state funding to various school districts (differences were in the magnitude of $75 per student). The United States Court of Appeals had dismissed the Equal Protection challenge based on its reading of the Rodriguez case. The Supreme Court reversed, noting that "Rodriguez did not, however, purport to validate all funding variations that might result from a State's public school funding decision." Papasan, 106 S.Ct. at 2945. Papasan points to the continued vitality of even the Federal Equal Protection Clause to close scrutiny of those parts of the School Finance System which are under state control.

C. State Cases

Appellants seek to cast Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556 (Tex.1985), app. dismissed, 106 S.Ct. 1170 (1986), and Sullivan v. University Interscholastic League, 616 S.W.2d 170 (Tex.1981) as cases involving "educational matters" (Andrews brief at 17) and therefore supporting the application of the rational basis test in this case as in those. But Stamos held that there was no fundamental right to participate in extracurricular activities, Stamos, id. at 559, and Sullivan involved the rationality of an anti-transfer rule in high school athletics, and found it irrational. Sullivan, id. at 173. Neither of these cases involved the educational issue here-the constitutionality of the school finance systems that controls the entire educational destiny of these children.

In reaching its conclusion that education is a fundamental interest in Texas the Trial Court did not consider itself bound by the decisions of the United States Supreme Court, noting instead that Texas courts are "free to accept or reject federal holdings" in formulating a body of law under the state's own Constitution. Whitworth v. Bynum, 699 S.W.2d 194, 196 (Tex.1985). The Trial Court undertook precisely the kind of role left open to the Texas courts by Rodriguez. It examined the specific language and history pertaining to education in Texas constitutional law, heard the testimony of the witnesses concerning the essential nature of education to the life of the state and the liberties of its citizens, and considered the reasons put forth by the Appellants in justification for the factual conditions of inequality which appeared in the record. The Trial Court's ruling was based upon all three tests used in the United States Supreme Court cases: the system failed under a (1) strict scrutiny test since education was found to be fundamental; it failed as well under the (2) substantial interest and (3) rational relationship tests since the local control assertions of the Appellants were found to be insubstantial and not rationally related to legitimate state interests.

Far from mechanistically applying the Rodriguez "explicit or implicit" test, the Trial Court undertook just the kind of necessary and responsible analysis of the State Constitution in light of local facts and circumstances which other courts have followed in similar cases.

Appellants object to the Trial Court's finding of a

fundamental interest in education because of the many interests covered in the Texas Constitution, not all of which can be fundamental. Appellants Andrews ISD point out that "open saloons, bingo and horse racing are empowered by the Texas Constitution. Yet, no one would argue that any of the foregoing constitute a fundamental right." (Andrews Brief at 12). Appellants Eanes ISD derive their own list of lesser known provisions of the Constitution and come to a similar conclusion. (Eanes Brief at 17-18). This is just the sort of approach to the question which Mr. Justice Blackmun noted in Plyler v. Doe would commend itself only to a "pedant."

The Trial Court's conclusion that education is fundamental rested on its undeniable finding that: "it is apparent that as a factual matter education is fundamental to the welfare of the State and is a guardian of other important rights" (TR.538). It is not the commonality of consitutional reference which is remarkable but rather the unique, fundamental and essential nature of education which distinguishes itself from each and every one of the other provisions the Appellants cite.

Other state courts have understood the obvious difference. "Education is fundamental", stated the California Supreme Court, because of its impact "on those individual rights and liberties which lie at the core of our free and representative form of government." Serrano, 557 P.2d at 952. This is because "the right to equal educational opportunity is basic to our society... the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established

rights." Dupree v. Alma School District No. 30, 651 S.W.2d 90, 93 (Ark.1983). As a Montana court noted in its very recent January 1988 ruling finding that state's school finance system unconstitutional, education, "is most assuredly a right without which other constitutionally guaranteed rights would have little meaning." Helena Elementary School Dist. No. 1 v. State of Montana, Cause No. ADV-85-370, (Montana 1st Jud. Dist., Lewis and Clark County, January 13, 1988). In sum, education, "is the very essence and foundation of a civilized culture, it is the cohesive element that binds the fabric of our society together." Horton v. Meskill, id. at 377, (Bogdanski, J. concurring).

Unlike any other state run social program which the Appellants might enumerate, only in the area of education does the state actually compel attendance of the young in the public schools and do so for nearly the entire span of a childhood. Horton v. Meskill, id. at 374. This and similar distinguishing features of the educational system are enumerated by the Trial Court.

D. Analysis of Language and Structure of Texas Constitution

Education is distinguishable from other provi ons of the Constitution on a more narrow textual basis as well. There is a specific Education Article in the Texas Constitution and it has been there for more than 140 years. The essential nature of public education and the corresponding state duty has its source in the Texas Declaration of Independence. The Constitution of 1845 contained the explicit "essential ...duty" language. In

fact Texas' very admission to the Union was conditioned upon its guarantee of public schooling. A:

> sacred compact was entered into by and between the people of Texas and the Congress of the United States that the Constitution of Texas shall never be so amended as to deprive any citizen or class or citizens of the United States of the school rights and privileges secured by the Constitution of said State.

Debates in the Texas Constitutional Convention of 1875 at 338. The very language of Article VII, Section 1 makes it clear that education is "essential" and that the Legislature carries a "duty" to establish and make suitable provision for an efficient system of public free schools. None of the other provisions cited in the several Appellants' briefs contain language denoting a subject "essential" to the preservation of the liberties and rights of the people of Texas. Thus, the Texas Constitution falls squarely within those state constitutions making education a mandatory duty in contrast with those containing mere hortatory clauses. Seattle School District No. 1 of King County v. State, 585 P.2d 71, 83-85 (Wash.1978).

Article VII, section 1 of the Constitution states as follows:

> §1. Support and maintenance of system of public free schools
>
> Section 1. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

The word "essential" used in Article VII, section 1 is the same used in the introduction to the Texas Bill of Rights, i.e.

> That the general, great and essential principles of liberty and free government may be recognized and established, we declare:

Tex. Const. Ann. art. I, Introduction

One of the reasons for the finding in Rodriguez that education is not a fundamental right under the United States Constitution was a failure to show a nexus between education and the fundamental rights of voting and speech. The nexus between education and the Bill of Rights in Texas is clear. Article VII, §1 states "a general diffusion of knowledge being essential to the preservation of the liberties and rights of the people..." The language of Article VII, section 1 also defeats Defendants' arguments that only matters guaranteed by the Texas Bill of Rights are accorded fundamental status by the Texas Constitution. The Texas Constitution itself states that education is essential to the preservation of the rights guaranteed by the Texas Bill of Rights.

In an "opening the floodgates of litigation" argument and as a scare tactic, Appellants have described the potential disastrous consequences of the definition of education as a fundamental right. Appellants do not quote any case from the states which have declared education to be a fundamental right showing the application of this theory in a "dangerous" fashion.

The educational malpractice cases have been brought under intentional tort theories and have been uniformly unsuccessful. See, e.g., Doe v. Bd. of Educ. of Montgomery County, 453 A.2d 814 (Civ.App..-Md. 1982).